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ABSTRACT

This document describes in some detail the origins and implications of the Michigan Teachers' Tenure Act of 1964. After describing the nature and general effects of tenure, the document discusses specific aspects of tenure law, citing relevant court cases and decisions by Michigan's Tenure Commission. The first topic covered is probationary service, including requirements and definitions of the probationary period, procedures for nonreemployment of probationary teachers, and dismissal of probationary teachers. The discharge or demotion of tenured teachers is discussed next, including procedures, adequate justification for the actions taken, and the characteristics of hearings and formal charges. The full range of the right of appeal of tenured teachers is reviewed in the fourth chapter. The fifth chapter deals with the relationship between tenure and such related personnel matters as leaves of absence, layoff and recall, transfer and reassignment, discontinuance of service, retirement, and extra pay for extra duty. The last two chapters cover tenure for administrators and remedies for tenured personnel wrongfully suspended, demoted, or discharged. Appendixes include the text of the Teachers' Tenure Act, the procedural rules of the State Tenure Commission, and listings of relevant decisions of state courts and the state's Attorney General. (PGD)

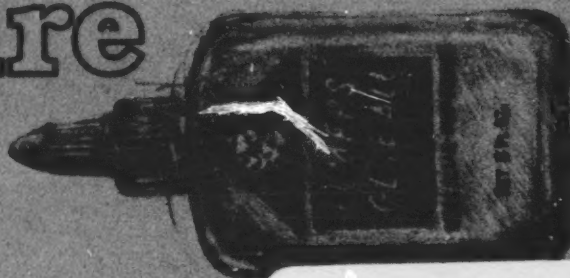
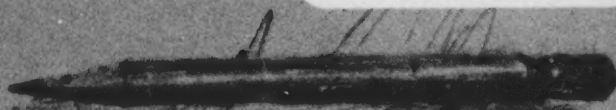
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The major purpose of this book is to provide teachers with guidelines for understanding their rights under the Tenure Act and help administrators avoid costly errors in administering the Act.

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THE MICHIGAN TEACHER AND TENURE

A STUDY
of
THE MICHIGAN TEACHERS' TENURE ACT
1980

KENNETH GRINSTEAD, PH.D.
PROFESSOR
EASTERN MICHIGAN UNIVERSITY

Elken Associates
2507 Meade Court
Ann Arbor, MI
48105

Preface

Every teacher, school administrator and school board member will be confronted with the need for complete and up-to-date information about the Michigan Teachers' Tenure Act. This book is an attempt to provide that information.

The need for a comprehensive discussion of teacher tenure in Michigan has been precipitated by the numerous cases on the subject which have come before the Tenure Commission and the courts of the state in recent years. It is the writer's belief that more adequate information about tenure would have kept at least some of these cases from arising.

Much of the substance of this book has been taken from the Michigan Teachers' Tenure Act, decisions of the courts and the Tenure Commission, and opinions of the Attorney General. It is designed to promote uniform interpretation of tenure legislation by using these references.

The author has taught courses in school law at Eastern Michigan University. This book is to be used to supplement class instruction and serve as a resource or reference for teachers, school administrators and school board members. It should never be used as a substitute for an attorney.

A debt of gratitude is owed to those individuals who assisted the author in completing this study. The author wishes to thank Almee Ergas for editing and proof reading; Diane Dufek, Wendy Vanderhoof, Arlene Phillips for typing the first drafts; and Carol Barnett for typing the manuscript.

Eastern Michigan University
January, 1986

Kenneth Grinstead

TO
THE STUDENTS, STAFF, AND FACULTY
(PAST AND PRESENT)
OF THE
DEPARTMENT OF EDUCATIONAL LEADERSHIP
EASTERN MICHIGAN UNIVERSITY
and
ESPECIALLY TO MY WIFE
ELLIE

There is much history behind the Teachers' Tenure Act. Before the Act some school boards for favoritism, politics or other invalid reasons hired and fired teachers in an arbitrary and capricious manner without real regard either to the education of the pupils involved or to the teachers concerned. This was equally injurious to the future of our children, the efficacy and dignity of the teaching profession and the welfare of our State. Only by establishing the right of the teacher during competence and good behavior to continue in his job once he had proven himself worthy and well qualified could parents and the state be assured their children would receive the education necessary to achieve fulfillment and to fit them to play their full roles in our society. The Teachers' Tenure Act assures that job right.

Justice G. Mennen Williams

(Dissenting opinion in Shiffer v.
Bd. of Educ. of Gibraltar Sch.
Dist., 393 Mich 190, 224 N.W.2d
255)

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CHAPTER I

OVERVIEW

INTRODUCTION

Teacher tenure is essentially an employment security device by which the teacher attains permanent status and protection against dismissal except for stated cause. It also provides certain procedural safeguards. Tenure systems minimize undesirable aspects of the employment relationship within which teachers work.

Although statutory tenure schemes vary in detail, their general patterns can be described briefly. The new teacher is on probation for a certain number of years, during which time reemployment may be denied at the end of the school year, though dismissal during the year must be "for cause." If reemployed at the end of the probationary period, the teacher then holds his¹ position without further election. A tenured teacher may be dismissed only "for cause" and only after notice accompanied by written charges, opportunity of a hearing and a board of education finding that the charges are valid. The teacher has the right to counsel, and the board is authorized to subpoena witnesses for either side to give testimony under oath. The action of the board is usually subject to review by an administrative body or commission. Of course the teacher is entitled to judicial review, as provided by law.

The rights created under the Michigan Teachers' Tenure Act² do not exist under either the federal or state constitution but are granted exclusively by statute. Hence, the procedural and substantive dimensions of this property right (tenure) are part and parcel of the legislative definition and content of the right.³

DEVELOPMENT OF TENURE LEGISLATION

Teacher tenure as a solution to job security in the profession was discussed as early as 1884, and its development paralleled that of the

¹The male gender is used throughout this booklet in its generic sense, applying to males and females.

²MCLA 38.71 et seq.; MSA 15.1971, et seq.

³*Rogers v. Trenton Bd. of Educ.*, 61 Mich. App. 682, 233 N.W.2d 141 (1975).

civil service. In 1883 the abuses existing by reason of the "spoils system" resulted in the first Civil Service Act, designed to curb the excessive turnover of government employees resulting from political changes in government. Tenure for teachers is the application of civil service principles to the teaching profession. It was based on the concept that teaching should be made independent of personal or political influence and freed from the spoils and patronage system.

In 1884 the National Education Association (NEA) created a committee to study the question of tenure. The committee submitted a report recommending the establishment of tenure principles similar in substance to those applied to civil service employees. In 1886 Massachusetts enacted a teacher tenure law which permitted school districts to enter into contracts for periods longer than one year.

The NEA adopted a resolution in 1915 unequivocally favoring tenure legislation and reaffirmed its position almost every year thereafter. In 1920 the NEA issued its first report devoted exclusively to tenure, and in 1923 the Committee of One hundred on Problems of Tenure was established. The first report of this committee, issued in 1924, brought to light the job instability in the teaching profession. It reported that statewide turnover of teachers in 1923 ranged from a low of four percent in Florida to a high of 47 percent in Wyoming, and that in many areas turnover was greater.

In 1960, the Michigan Supreme Court noted that one of the purposes of the Michigan Teachers' Tenure Act was to reduce teacher turnover.⁴ Moreover, it was meant to prescribe rules of administrative action for school boards concerning discharge of teachers that would insure a greater degree of security to teachers. The courts quoted the following passage from The University of Michigan Law Review, itemizing some of the evils practiced by school boards prior to the advent of tenure legislation:

The large turnover in the profession was due in part to certain practices which were widespread throughout the country; among them may be noted discharge (1) because of political reasons, (2) because of nonresidence in the community, (3) in order to make places for friends and relatives of board members or influential citizens, (4) in order to break down resistance to reactionary school policies, and (5) in order to effect economies either by diminishing the number of teachers and increasing the amount of work assigned to those retained, or by creating vacancies to be filled by lower salaried, inexperienced employees. Of these practices the first was exceedingly influential in the growth of the tenure movement, some of the more notorious cases of

⁴ The Problem of Teacher Tenure, 145 Nat'l Educ. Assn. Research Bull. (1924).

⁵ Wilson v. Flint Bd. of Educ., 361 Mich. 691, 106 N.W.2d. 136 (1960).

political dismissal challenging the attention of the public to the injury to professional morale and efficiency resulting from the misuse of the control vested in the administrative agencies. The remedy for such abuse was sought in legislation designed to strip the school boards of their autocratic power and to prescribe for them rules of administrative action which would ensure a greater degree of security to their employees.⁶

In the absence of tenure legislation, the authority of school boards to dismiss teachers almost at will was supported by the courts. The following case is illustrative. In 1916, sixty-eight Chicago teachers with ratings of "satisfactory" and with recommendations of the superintendent for reemployment were dismissed without notice or hearing, and no charges were filed against them. In affirming the school board's action, the Illinois Supreme Court said:

No person has a right to demand that he or she shall be employed as a teacher. The board has the absolute right to employ or to re-employ any applicant for any reason whatever or for no reason at all. . . . It is no infringement on the constitutional rights of anyone for this board to decline to employ him as a teacher in the schools, and it is immaterial whether the reason for the refusal to employ him is because the applicant is married or unmarried, is of fair complexion or dark, is or is not a member of the trades union, or whether no reason is given for such refusal. The board is not bound to give any reason for its action.⁷

Of course, injury to professional morale and efficiency resulted from misuse of the power such court decisions vested in local boards of education. It was obvious that tenure or permanent status could be achieved only through legislative action rather than through the courts.

In 1939, tenure legislation of one sort or another was in force in nineteen states and the District of Columbia. By 1959, more than three-fourths of the states had some kind of tenure legislation. Since October 1970, a teacher tenure or fair dismissal law has been in effect statewide in thirty-seven states and Washington, D.C. These laws are mandatory and apply to all school districts in the state without exception, although the provisions may vary according to size or class of school district. Eight states have tenure laws that apply to certain designated cities, counties, or school districts. Only five have no tenure laws whatsoever.⁸

⁶Lebel, Teacher Tenure Legislation, 37 Mich. L. Rev. 430 (1939).

⁷People ex rel. v. City of Chicago, 278 Ill. 318, 116 N.E. 158 (1917).

⁸Teacher Tenure and Contracts, 1971-R3 Nat'l Educ. Ass'n Research Rep. 7 (1971).

Tenure legislation was adopted in Michigan in 1937, but was applicable in each local school district only upon approval by the electors of the district. The Michigan Legislature made the Teachers' Tenure Act applicable to all districts effective August 28, 1964.

LEGISLATIVE PURPOSE OF TEACHER TENURE

As early as 1940, The Minnesota Supreme Court, considered the purpose of tenure legislation existing in that state. Minnesota had adopted tenure for its teachers in 1937. In 1939, one school district discharged its assistant superintendent and all teachers, effective at the close of the school year, on the grounds that it could not determine what their salaries would be because of a possible decrease in state aid. Commenting on the intent of the Minnesota Legislature in adopting teacher tenure, the Minnesota Supreme Court stated:

The purpose of that teacher tenure act was to do away with the then existing chaotic conditions in respect to termination of teachers' contracts. Until then, in many cases teachers would be left in a state of uncertainty as to whether they would be re-elected for the ensuing year. In many instances this state of uncertainty ran over a period of months. The later in the year that a school board acted, the greater the teachers' disadvantage in finding vacancies elsewhere.⁹

In 1951, the Michigan Supreme Court had its first opportunity to construe the Teachers' Tenure Act in Rehberg v. Ecorse School District.¹⁰ It cited with approval several court opinions interpreting similar statutes in other states. The Michigan Supreme Court extracted and summarized these opinions as follows:

(The Tenure Act) purpose is to maintain an adequate and competent teaching staff, free from political and personal arbitrary interference. . . It promotes good order and the welfare of the State and of the school system by preventing removal of capable and experienced teachers at the personal whim of changing office holders. . . (t)he purpose of the act is to protect and improve State education by retaining in their positions teachers who are qualified and capable and who have demonstrated their fitness, and to prevent the dismissal of such teachers without just cause.¹¹

⁹Downing v. Independent Sch. Dist. No. 9, 207 Minn. 292, 291 N.W. 613 (1940).

¹⁰330 Mich. 541, 48 N.W.2d 142 (1951).

¹¹Id at 545, 48 N.W.2d at 144.

The Court noted, however, that it was not the purpose or intention of the Act to deprive school boards of administrative control over teachers, and that except for protecting teachers from arbitrary or unreasonable dismissal, it did not diminish or interfere with the administrative power of local boards of education.

After the Rehberg decision, other Michigan Courts opined on the purpose of the Teacher's Tenure Act. A panel of the Court of Appeals stated:

The purpose of the Teachers' Tenure Act was to eliminate capricious employment practices by school boards and protect teachers from arbitrary and unreasonable dismissals, thus ensuring a greater degree of security.¹²

Another Court of Appeals panel cited three basic principles of the Teachers' Tenure Act: (1) to protect teachers' rights, (2) to provide a remedy to protect teachers from discriminatory practices in hiring, promotion and fringe benefits; and (3) to provide a hearing by the board of education which comports with procedural due process before a tenured teacher can be discharged.¹³

The Michigan Supreme Court has also held that the intent of the Teachers' Tenure Act was to eliminate capricious and arbitrary employment practices of local school boards against probationary as well as tenured teachers.¹⁴

Justice Williams has stated that tenure legislation is "dedicated to taking teachers out from under the thumb of arbitrary action by school boards" and the "Legislature's whole purpose in the teachers' tenure act was to preserve the integrity of teachers' tenure, or right to continue in his job."¹⁵

¹²Blurton v. Bloomfield Hills Bd. of Ed., 60 Mich. App. 741, 744 231 N.W.2d 535, 537 (1975).

¹³Davis v. River Rouge Sch. Dist., 73 Mich. App. 358, 362, 251 N.W.2d 585, 587 (1977).

¹⁴Munro v. Elk Rapids Sch., 385 Mich. 618, 189 N.W.2d 224 (1971).

¹⁵Shiffer v. Gibraltar Sch., 393 Mich. 190, 210, 224 N.W.2d 255, 265 (1974).

More recently the Michigan Supreme Court held that the general purpose of the Tenure Act is to resolve conflicts between the teacher and the school board without the necessity of court action¹⁶ and to prohibit the arbitrary use of power.¹⁷

In summary, it can be said that the Michigan Teachers' Tenure Act was passed for the protection of teachers, not to take away their rights.¹⁸

ADVANTAGES AND DISADVANTAGES OF TENURE

Advantages

Tenure may be viewed as a desirable safeguard, since the tenured teacher is free from worry over renewal of his contract and can concentrate on teaching. Scholarship cannot flourish under a cloud of suspicion and mistrust; the security provided by tenure can help create a learning climate conducive to academic freedom. It also allows the teacher to exercise leadership outside the classroom despite any possible unpopularity of his individual views. He must be permitted to exercise the responsibility of teaching in an atmosphere of open inquiry, free from the inhibiting effects of misuse of the power to hire and fire.

Teacher tenure indirectly protects students' freedom to learn. Teachers who are secure in their own positions can devote full time to the pursuit of truth without fearfully looking over their shoulder to see whether their conduct is approved by the board of education, the superintendent or principal.

Tenure legislation sets up orderly and definite procedures by which undesirable people may be removed from the teaching profession. It allows for the maintenance of an adequate and competent teaching staff, free from arbitrary political and personal interference.

Disadvantages

Opponents of teacher tenure cite a number of disadvantages to school systems. Secure employment may attract the dull, less-adventurous teacher who desires a steady job rather than an opportunity for intellectual experimentation, inquiry, and change. A few teachers, knowing that they can maintain minimal output and still retain their jobs, may grow stale. Due to a short probationary period, both the teacher and the school district may suffer by a forced decision to grant or deny tenure before the

¹⁶Lipka v. Brown City Schools, 399 Mich. 704, 252 N.W.2d 770 (1977).

¹⁷Rockwell v. Crestwood Sch. Dist., 57 Mich. App. 636, 226 N.W.2d 596 (1975); *rev'd* on other grounds, 393 Mich. 616, 227 N.W.2d 736 (1975).

¹⁸Brulisma v. Wyoming Pub. Sch., 38 Mich. App. 745, 197 N.W.2d 95, (1972).

teacher's capabilities have been demonstrated. Teachers who are able to hide behind the protection of tenure to shelter their own incompetent behavior are detrimental to the reputation of the entire teaching profession.

Another argument against the tenure system is that it requires time-consuming and expensive dismissal proceedings. The proceedings may generate hostility and tension with the administration pitted against the teacher and his union.

But some of these disadvantages are not a result of teacher tenure laws; they are rather the fault of ineffective administrators. In its booklet Teacher Tenure Ain't the Problem, the American Association of School Administrators stated:

It is unfortunate but true that there is a substantial number of administrators who simply do not have the professional courage, or do not want to take the trouble, or who do not know how, to document charges that would lead to justified dismissal of the poor teacher. In such cases, it is very true that tenure laws protect and preserve weak and inept administrative practices, not just weak and inept teachers.¹⁹

The potential for psychological stress and pressures from teacher organizations or other sources may deter some school administrators from initiating dismissal proceedings.

School boards must also share some of the blame for the retention of incompetent tenured teachers. The time involved, the publicity, and the expense accompanying a full tenure dismissal hearing may lead a school board to decide it is easier to retain incompetent teachers than to terminate them through tenure proceedings.

Effective evaluation techniques, appropriate documentation, courage, good legal advice, and a school board dedicated to maintaining a competent teaching staff will overcome nearly all the disadvantages inherent in teacher tenure.

TENURE ACT STRICTLY INTERPRETED IN FAVOR OF TEACHERS

School administrators and school board members are often frustrated by the seemingly one-sided interpretation of the Tenure Act in favor of teachers. A review of numerous decisions indicates that the courts in the state have been uniform in requiring that boards of education strictly adhere to the requirements of the Tenure Act. The Act has been interpreted

¹⁹ Teacher Tenure Ain't the Problem, Am. Assn. of Sch. Administrators (1973).

quite literally in favor of the legislative purpose of protecting teachers' rights.²⁰

The case of *Elgammal v. Macomb County Intermediate School District*²¹ illustrates the courts' policy of interpreting the Tenure Act in favor of protecting teachers' rights. The board mailed a copy of charges against Mr. Elgammal on April 12, 1972, with instructions to request a hearing, if desired, within ten days. Elgammal was in the hospital and did not receive the letter until he returned home on April 28, 1972. Forty-six days after the charges were mailed, Elgammal had not requested a hearing. Noting that the Tenure Act required it to hold any hearing within forty-five days of the filing of charges, the board concluded Elgammal did not desire a hearing, proceeded to act on the charges and dismissed him. Elgammal then requested a hearing before the board, which was denied. The circuit court held that Elgammal's delay before requesting a hearing was not unreasonably long and the board was directed to grant a hearing.

APPLICABILITY

Teachers

The Tenure Act is applicable to "all certificated persons employed for a full school year by any board of education or controlling board of any public educational institution."²² Only teachers in public elementary and secondary school districts are included within the Act.²³ The Act does not apply to single district community colleges or community colleges operated by school districts since there are no provisions for certifying community college instructors,²⁴ nor does the mere holding of an elementary or secondary certificate by a person employed by a community college bring that person under provisions of the Act.²⁵

²⁰ *Weckerly v. Mona Shores Bd. of Educ.*, 388 Mich. 731, 202 N.W.2d 777 (1972).

²¹ 83 Mich. App. 444, 268 N.W.2d 679 (1978).

²² MCLA 38.71; MSA 15.1971.

²³ *Williams v. Sch. Dist. of Highland Park*, TTC 78-9, 78-10, 78-11.

²⁴ *Shaw v. Bd. of Trustees of Macomb County Community College*, 389 Mich. 69, 204 N.W.2d 129 (1973). Since the State Board of Education cannot validly require that community college instructors be certified (1961-62, p. 239 OAG No. 3478 [Jan. 24, 1962]), community college instructors cannot be covered by the Tenure Act. *Shaw v. Macomb Community College*, 37 Mich. App. 96, 98-99, 194 N.W.2d 558, 559 (1971).

²⁵ *Shaw v. Bd. of Trustees of Macomb County Community College*, 389 Mich. 69, 204 N.W.2d 129 (1973); *Williams v. Sch. Dist. of Highland Park*, TTC 78-9, 78-10, 78-11.

The eligibility of persons employed by school boards to be covered by the provisions of the Teachers' Tenure Act is determined by the term "certificated. . . as defined by the State Board of Education."²⁶ The State Board has provided separate definitions for certification requirements for Tenure Act applicability for probationary teachers²⁷ and for tenured teachers.²⁸

The Tenure Commission has issued several decisions involving coverage of the Act. A teacher cannot achieve tenure status simply by holding any type of certification or authorization valid for only a one-year term.²⁹ A "school diagnostician,"³⁰ "school attendance worker,"³² and "employment project director,"³² were held not to qualify as "teachers." The Commission has stated

We have frequently interpreted article I, section I, of the Tenure Act, which defines "teacher", to require that an individual not only be certificated but employed in a position for which certification is required.³³

If a teacher fails to become certified³⁴ or is initially certificated and loses certification status,³⁵ the teacher loses his tenure status and any rights and privileges under the Tenure Act.

The mere holding of a valid teacher's certificate by a school employee who occupies a non instructional position such as bus driver, cook, custodian, or secretary does not entitle the employee to coverage under the Tenure Act.

²⁶MCLA 38.72, MSA 15.1972.

²⁷State Bd. of Educ. R390.661 (a). See Appendix for the full text of the State Board of Education Rules.

²⁸State Bd. of Educ. R390.661 (b).

²⁹Douglas v. Detroit Bd. of Educ., Teacher Tenure Commission (hereinafter cited as TTC) 76-11.

³⁰Split v. Grand Haven Bd. of Educ., TTC 73-1.

³¹Roundtree v. Ecorse Bd. of Educ., TTC 74-37.

³²Justian v. Jackson Intermediate Sch. Dist., TTC 76-48.

³³Id. at 2.

³⁴Williams v. Cheboygan Sch. Dist., TTC 63-3.

³⁵Wilkins v. Avondale Sch. Dist., TTC 73-4.

Administrators

The question has arisen as to which administrative positions in school districts may be tenured positions. The Tenure Commission held incorrectly that the only position in which a teacher can gain non-classroom teacher tenure are those positions which require certification by the State Board of Education.³⁶ The Commission asserted that its expertise lies in the area of educational instruction and not in all aspects of operating a school district. Accordingly, the Commission held that since the position of "supervisor of buildings and grounds" does not require certification nor does it involve instructional supervision, a person could never gain tenure in such a position.³⁷ The Court of Appeals, however, disagreed with the Commission's decision and stated:

We read the statute as authorizing individual school districts to determine which administrative positions should carry tenure. Whether a tenured teacher who accepts an administrative positions [sic] is to be granted tenure is to be determined by contract between the teacher/administrator and the school board. We reject the contentions of the parties and the Commission that the statute should be interpreted to dictate categories of administrative positions which carry tenure as a matter of law.³⁸

A certificated teacher serving as a school administrator is eligible to the protection of the Teacher's Tenure Act at the option of the controlling board. Before a school board can authorize tenure to an administrator in his position, that person must have served the required two-year probationary period³⁹ and hold a teacher certificate as described in State Department of Education R390.661 (a) and (b). He must be eligible for teacher tenure. If a teacher held classroom tenure, he would retain that tenure despite promotion to, or elimination from, an administrative position.⁴⁰ School boards have authority to exclude all or some of their administrators from administrative tenure.

³⁶State Bd. of Educ., R390.1105 (1). "A person employed in an elementary or secondary school with instructional responsibilities shall hold a certificate, permit or vocational authorization for the position to which he is assigned." However, the Attorney General has held that the State Board of Education may not require that school administrators with supervisory responsibilities hold teaching certificates since there is no statutory requirement that administrators be certified. Opinion of the Attorney General (hereinafter OAG) 4143 (August 9, 1963, Vol. 1963-64, p. 172) and Letter Opinion, March 23, 1978.

³⁷Goodwin v. Kalamazoo Sch. Dist., TTC 75-35-R.

³⁸Goodwin v. Kalamazoo Sch. Dist., 82 Mich. App. 559, 566, 267, N.S.2d 142, 146 (1978).

³⁹Bode v. Roseville Sch. Dist., 405 Mich 517, 275 N.W.2d 472 (1979).

⁴⁰MCLA 38.91; MSA 15.1991. Goodwin v. Bd. of Educ., 82 Mich. App. 559, 656 n. 6, 267 N.W.2d 142, 145 n. 6 (1978).

Labor Disputes

The Teachers' Tenure Act does not apply to labor disputes between school boards and teachers.⁴¹ Section 6 of the Public Employees Relations Act⁴² (hereinafter PERA) provides that public employees who, in concerted action with others to support efforts to obtain a change in compensation or other conditions of employment, fail to render services, shall be deemed on strike. If the employee is disciplined by his school board for striking, he is entitled on request to a hearing by the controlling board on the question of whether or not he violated the provisions of PERA. If the employee is found to have violated PERA and is disciplined he may seek review in circuit court, but not before the Tenure Commission.

The Teachers' Tenure Act was not intended, either in contemplation or design to cover labor disputes between school boards and their employees.⁴³ Disciplinary actions subject to the jurisdiction of the Tenure Commission concern individual teachers except those engaged in concerted activity in a labor dispute. Requiring hearings under both the Teachers' Tenure Act and PERA could result in conflicting claims and conflicting adjudication with untoward consequences and delays.⁴⁴

Transferred Special Education Personnel

The Michigan Legislature approved the removal of special education programs from intermediate school districts to local school districts. This policy required the transfer of some special education personnel from intermediate to local (constituent) school districts. In order to clarify the tenure status of these teachers, the legislature passed legislation that (1) entitles special education personnel employed by the local constituent school districts to all rights under the Tenure Act, and (2) extends all the rights under the Tenure Act to special education teachers not originally employed by the local constituent district, subject to another year at the option of the controlling intermediate board.⁴⁵ However, a section of the State Aid Act probably

⁴¹Rockwell v. Crestwood Bd. of Educ., 393 Mich. 616, 227 N.W.2d 736 (1975).

⁴²MCLA 423.206; MSA 17.455(6).

⁴³Rockwell v. Crestwood Bd. of Educ., 393 Mich. 616, 227 N.W.2d 736 (1975).

⁴⁴Id.

⁴⁵MCLA 380.1766; MSA 15.41766. (1) When employing additional personnel to implement special education programs and services, the board of a constituent district shall employ first an employee of the

grants more extensive protection for special education teachers subject to transfer."⁴⁶

intermediate school district in which it is located whose employment is discontinued because the intermediate school district or state agency located within the district is discontinuing the special education program or service for which the person was employed.

(2) Special education personnel employed under subsection (1) shall be entitled to all rights and benefits to which they would otherwise be entitled had they been employed by the constituent school district originally. The persons shall be entitled to all rights under Act No. 4 of the Public Acts of the Extra Session of 1937, as amended, being sections 38.71 to 38.191 of the Michigan Compiled Laws, to which they would have been entitled if employed originally by the constituent district, except that at the option of the controlling board, they may be subject to another probationary period of 1 year.

(3) This section shall not apply when the affected person is covered under an agreement which provides substantially the same benefits.

⁴⁶MCLA 388.1451 (3); MSA 15.1919(75) (4). "Special education personnel transferred from one district to another to implement the school code of 1976 shall be entitled to the rights, benefits, and tenure to which the person would otherwise be entitled had that person been employed by the receiving district originally."

CHAPTER II

PROBATIONARY SERVICE

PROBATIONARY PERIOD REQUIREMENTS

Almost all states having tenure laws require a probationary period before a teacher can acquire tenure status. In Michigan, it is necessary for teachers to meet certain minimum certification requirements so as to be eligible to accrue probationary service credit.

Certification Requirements

The eligibility of teachers to accrue required probationary credit and achieve tenure depends on the type of teaching certificate they possess. The term "teacher" as used in the Teachers' Tenure Act is defined to "... include all certificated persons employed for a full school year by any board of education or controlling board of any public educational institution."¹

The Teachers' Tenure Act directs the State Board of Education to define the term "certificated" as (1) it applies to the acquisition of probationary service credit and (2) as it applies to the teacher's eligibility to acquire tenure.² State Board of Education Administrative Rule 390.661 entitled "Certification of Teachers Under Teachers' Tenure Act," defines the term "certificated." Part a applies to that portion of the Tenure Act setting forth the requirements of the probationary period. Part a provides that "... 'certificated' as it refers to teachers shall include any teacher holding a Michigan certificate which is valid for the position to which he is assigned, but shall not include nondegree persons holding special certificate as teachers or teacher aides in training in experimental programs."³

A teacher holding a valid Michigan teacher's certificate based on a four-year degree may accrue credit toward fulfilling the probationary period, providing he works full time. Service as an occasional substitute or part-time teacher will not qualify a teacher for tenure. However,

¹MCLA 38.71, MSA 15.1971.

²MCLA 38.72, MSA 15.1972.

³Michigan State Bd. of Educ., R390(661)(a).

"permanent substitutes" and part-time teachers working full time, such as kindergarten teachers working one-half day, may count such service as regular full time probationary service for tenure purposes.⁴

The certification requirements for achieving tenure are described in State Board of Education Rule 390.66(b). In general, the teacher is required to hold a provisional certificate or better in order to be eligible for tenure status. It is essential to distinguish between the type of certificate required for the accumulation of probationary credit and the type of certificate necessary for the acquisition of tenure status. Probationary service credit can accrue if the teacher holds a four year degree. The certificate could be less than a provisional. A teacher, however, must hold the provisional certificate, or better, before he can acquire tenure status.

Probationary Period Defined

The Michigan statute requires that a beginning teacher complete a satisfactory probationary period of two years before attaining tenure status.⁵ During this period the probationary teacher is employed on an annual contractual basis and his contract is subject to nonrenewal at the discretion of the board. The probationary period is "a period of proof" or "trial period." The teacher attains tenure after serving on a regular, full-time basis for two years and then is appointed by the board to continue teaching in its schools.

A teacher acquires tenure in a school district rather than in a particular school building, grade level, department, or program. It is not necessary to serve the two probationary years in the same school building or under the same building administrator. It is mandatory that the two years be served under the same school board.

⁴ Hughes v. Bullock Creek Sch. Dist., TTC 72-9, aff'd on this point, Bullock Creek Sch. Dist. v. Michigan Teacher Tenure Commission and Judith Hughes, Circuit Court Ingham County, No. 4102, June 20, 1974. The court stated the question before it as: "Can a part-time teacher gain tenure status upon completion of two years in a probationary status, or must the teacher, because of the fact that she was working under a half-time contract with half-pay complete four full years of probation?" *Id.* at 3. The court held that two years of part-time work at half-pay constituted two probationary years.

⁵ MCLA 38.81; MSA 15.1981. A board of education is precluded from granting tenure to a probationary teacher after teaching only one year in the district, his having had no other teaching experience in Michigan public schools. Ellis v. Wakefield Twp. Sch. Dist., 79 Mich. App. 347, 261 N.W.2d 320 (1977).

Teaching service in other states⁶ or in nonpublic schools will not fulfill any portion of the probationary period requirement. Any teacher who previously taught in a Michigan school district and failed to achieve tenure must serve a two-year probationary period when employed in another district. Probationary service "credit" is not transferable from one district to another.

While the Michigan Teachers' Tenure Act provides for tenure status following two years of satisfactory service, it does not state that the two years of employment must be consecutive years. The Michigan courts have not ruled on this question. The Attorney General has stated that the statute does not require that the two probational years be consecutive.⁷ However, it is doubtful that a teacher could resign his position after one year of service, teach in another district, then return to the district where he first taught and claim that his first year of employment fulfilled part of his probationary period.

Probationary service earned entirely in the same school district, which is interrupted by military service, by a leave of absence, or any a lay-off period in which they were not employed by another school district could probably be counted.

Occasionally, after a teacher completes a satisfactory probationary period and is eligible to achieve tenure status, he resigns and accepts a position in another school district. The question is unresolved as to whether the teacher should be required to complete a two-year probationary period in the new district or whether he is eligible for immediate tenure status. If a teacher has achieved two years of satisfactory service and is laid off, the teacher is probably eligible for tenure if employed in another district. However, no legal precedents can be cited to support this conclusion.

It is clear that if a teacher's two-year probationary period has been unsatisfactory and his contract has not been renewed, he cannot transfer to another district and be eligible for tenure.

Defining Non-standard Probationary Time

For probationary teachers employed to start teaching at the beginning of the school year on a one-year contract, the question of defining the first probationary year is generally quite simple; it is the same as the "school year." But some teachers are employed to commence work at a time other than the opening day of school. For example, school districts

⁶1975-76, p. 459, OAG No. 4976, May 14, 1976.

⁷1949-50, p. 503, OAG No. 1126, March 17, 1950.

often employ a few new teachers to start teaching at the end of the first semester, or about February 1. For these teachers, computation of the first and second year of probation is individualized and dependent on the date of hire.

For example, if a new teacher was employed to begin teaching on February 1, 1979, his first year of probationary service ends January 31, 1980. His second year of probation starts February 1, 1980 and ends January 31, 1981. An opinion of the Attorney General supports this interpretation:

It is our opinion that the completion of an equivalent of two complete school years of service, not necessarily calendar years, is prerequisite to tenure under the Michigan Teacher Tenure Act. . .

While the Tenure Act, Article 11, does not make express provision for credit of fractions of school years toward the completion of the two year probationary period of a beginning teacher, neither does the act expressly require the completion of the two complete, consecutive and regular school years. The probationary period implies that a beginning teacher is 'on trial' during the first two years of employment in respect to his being granted tenure. This is the prescribed length of time given to the board within which to determine the teacher's fitness and capabilities and to decide whether he merits continuous tenure in the district. We think that the period should not be extended through interpretation beyond the statutory requirement.

In view of this situation, it is our opinion that the teacher in question who was employed on December 1, 1947, would have completed the two probationary school years of service of December 1, 1949.⁸

Sometimes teachers serve nearly, but not quite, all of the school year and the question arises as to how many days are required to fulfill the requirements of a full school year. A "teacher" as defined by article 1, section 1 of the Act is a certificated person employed for a full school year by a school board.⁹ The legislature did not intend to exclude from the coverage of the Act a person who teaches on a full-time basis for a whole school year except for a few days. If the probationary teacher taught every day but three and some permissible sick and leave days, he would have earned one year of probationary credit.¹⁰

⁸ 1949-50, p. 503, OAG No. 1126, March 17, 1950.

⁹ MCLA 38.71; MSA 15.1971.

¹⁰ *Blurton v. Bloomfield Hills Bd. of Educ.*, 60 Mich. App. 741, 231 N.W.2d 535 (1975). The teacher in this case taught every day but three

The minimum number of days required to constitute a full school year for purposes of interpreting the Tenure Act remains to be clarified.

School administrators and teachers should exercise care in computing probationary years. The sixty-day notice requirements for non-renewal of contracts must be considered in relation to the end of the teacher's probationary year(s) rather than the end of the school year, if the teacher began work in midyear. For example, a Michigan teacher started teaching January 29, 1968, and was notified in a letter dated March 26, 1970, that her services would be discontinued at the end of the 1969-70 school year. The Tenure Commission held that the notice was not timely and ordered the teacher reinstated with tenure.¹¹

Third Year of Probation

The Michigan statute provides that a third year of probation may be granted to a probationary teacher after completion of two years of probation.¹² This is contingent upon written notice to the Tenure Commission¹³ of a properly authenticated copy of the board resolution imposing a third year of probation. This provision was established for the teacher who has not satisfied the board sufficiently to warrant granting of tenure status. The third year of probation extends the "trial period" from two to three years and is considered to be for the benefit of the teacher.¹⁴

plus some permissible sick and leave days. The Court was concerned that school boards could circumvent the Teachers Tenure Act by subterfuge and stated: "First, a literal interpretation of this phrase (a full school year) would allow a school board to circumvent the notice provisions contained in MCLA 38.83; MSA 15.1983, by simply hiring a probationary teacher a few days after the school year has begun. It is clear the legislature did not intend this result." *Id.* at 744, 231 N.W.2d at 537.

¹¹ *Cavalier v. Warren Woods Bd. of Educ.*, TTC 70-18.

¹² MCLA 38.82; MSA 15.1982. "No teacher shall be required to serve more than 1 probationary period in 1 school district or institution: Provided, That a third year of probation may be granted by the controlling board upon notice to the tenure commission."

¹³ *Id.*

¹⁴ *Wilson v. Flint Bd. of Educ.*, 361 Mich. 691, 106 N.W.2d 136 (1960).

Granting a teacher a third year of probation as permitted by statute is not a final decision. It only continues the "period of trial." As is discussed later, it is not necessary for a board to provide reasons for extending the probationary period to three years. The statutory procedural requirements for discontinuance of service do not apply to an extension of the probationary period to three years.

Educators have raised the question of whether a board of education may ever "require" a teacher to serve a third year of probation, since the language in the statute uses the word "grant," which implies that the third year of probation must be requested by the teacher. It is doubtful that the legislature intended that teachers could be placed on a third year of probation only if they submitted requests to the school board.

The Michigan Supreme Court held that a board has authority to "require" a teacher to serve a third year of service in the district on a probationary status, if he decides to continue his employment in the district.¹⁵ Under this interpretation, a board of education would state to the teacher, in effect: "You have served two years of probationary service in the district. We are not fully satisfied with your work, but we believe you show promise of becoming a good teacher. Therefore, we are requiring you to serve a third year of probationary service rather than granting you tenure." This interpretation more adequately expresses the meaning of the statute.

A board of education, by policy, cannot require all probationary teachers to serve a third year of probation. This matter was settled by the Michigan Supreme Court.¹⁶ In April 1954, the board of education of Flint adopted a policy "requiring" three years of probation for all new teachers in the Flint school system. A teacher employed by the board as a probationary teacher for the school year 1956-57 was given a probationary contract. No written statement as to the character of her work was furnished to her at the conclusion of the school year. The same procedure was followed for the second year; again, she was given no written notification whatever as to the quality of her work, whether satisfactory or otherwise.

Early in 1958, she and all other second-year probationary teachers remaining under contract were placed on third-year probationary status by order of the board, and the State Tenure Commission was so notified. A year later, on March 12, 1959, the superintendent informed the teacher that he "could not conscientiously recommend (her) for a tenure contract," and on March 24 she was notified of her discharge, effective June 12, 1959, at the end of the third year of the probationary period prescribed by the board. The teacher requested a hearing before the

¹⁵ *Amato v. Oxford Area Sch.*, 402 Mich. 521, 266 N.W.2d 445 (1978).

¹⁶ *Wilson v. Flint Bd. of Educ.*, 361 Mich. 691, 106 N.W.2d 136 (1960).

board which was held, and the teacher was later notified of its adverse decision. She appealed and the Tenure Commission held she had not been afforded all the procedural requirements of the Tenure Act.¹⁷ The decision of the Tenure Commission was appealed. The Michigan Supreme Court, in reviewing the case noted that the basic question to be resolved was whether the teacher was tenured and entitled to the procedural safeguards of the act prior to dismissal. The essential issue was whether or not a controlling board could require all teachers to serve a third year of probation. On this issue the court stated:

We have made reference heretofore to the "policy" of the board to "require" 3 years of probation for a beginning teacher. But the State, also, has a policy as to beginning teachers expressed in the teachers' tenure act. That policy is that the probationary period shall be not 3 years but 2. "No teacher," says the statute, "shall be required to serve more than 1 probationary period," such period having been heretofore defined as 2 years' duration. It is true that a board may "grant" a third year of probation to a teacher, but the language of the grant (as opposed to that of a requirement) makes clear that the third year is for the benefit of the teacher, who may not have satisfied the board fully but who may have shown promise nonetheless. Nowhere in such language is there any foundation for saying that a board may require, in all cases, 3 years of probation. . . .¹⁸

It appears well settled that a board of education cannot adopt a policy requiring all probationary teachers in the district to serve a third probational year. Boards of education may require individual teachers to serve a third year of probation. In the absence of a notice placing the teacher on a third year of probation he will attain tenure upon completion of the two-year probationary period.¹⁹

The procedural requirements necessary to place a teacher on the third year of probation are summarized as follows. The school board must make the decision at a public meeting to extend the probationary period to a third year,²⁰ and must send the necessary notice to the Tenure Commission.²¹ It is reasonable to assume that a sixty-day notice stating

¹⁷Wilson v Flint Bd. of Educ. TTC (unnumbered about July 15, 1959).

¹⁸Wilson v. Flint Bd. of Educ., 361 Mich. 695, 106 N.W.2d 136, 138 (1960).

¹⁹1957, p. 377, OAG No. 2992, August 12, 1957; 1958, p. 265, OAG No. 3297, October 15, 1958.

²⁰Anderson v. Adrian Bd. of Educ., 73 Mich. App. 33, 250 N.W.2d 786 (1976).

²¹MCLA 38.82; MSA 15.1982.

the reasons for requiring the third year would be mandatory; that may not be the case however. In *Amato v. Oxford Area Schools*,²² the Michigan Supreme Court declined to hold the board responsible for formally designating that the work was "unsatisfactory," or even that a sixty-day notice was required for a third year of probation.

The following is the summary statement of the Court's holding taken from the "Headnotes:"

The sections of the teacher tenure act controlling the granting of a third year of probation²³ and the discontinuance of the services of a probationary teacher²⁴ must be read separately. The former is directed towards a continuance of service, the latter towards a discontinuance of service. To add the statutory procedural requirements for the discontinuance of a probationary teacher to those which apply to an extension of a probationary period would require straining out of the context the plain words of the statutes. The Court cannot attribute to the Legislature a meaning inconsistent with the act's purpose, which is to grant a third year of probation upon a decision by the board of education that a teacher's work is not entirely satisfactory but that there has been demonstrated some reason to believe that the teacher could improve.²⁵

Justice Williams dissented, holding that the sections of the Tenure Act controlling the granting of a third year of probation and the discontinuance of service of a probationary teacher must be interpreted so as to give meaning to both, if at all possible. Justice Williams stated:

²²402 Mich. 521, 266 N.W.2d 445 (1978).

²³MCLA 38.82 MSA 15.1982. "No teacher shall be required to serve more than 1 probationary period in any 1 school district or institution: Provided, that a third year of probation may be granted by the controlling board upon notice to the tenure commission."

²⁴MCLA 38.83, MSA 15.1983. "At least 60 days before the close of each school year the controlling board shall provide the probationary teacher with a definite written statement as to whether or not his work has been satisfactory. Failure to submit a written statement shall be considered as conclusive evidence that the teacher's work is satisfactory. Any probationary teacher or teacher not on continuing contract shall be employed for the ensuing year unless notified in writing at least 60 days before the close of the school year that his services will be discontinued."

²⁵*Amato v Oxford Area Schools*, 402 Mich. 521, 266 N.W.2d 445 (1978). (From Headnotes, p. 521.)

The written notice which must be given to the teacher. . . performs two functions. . . The first is to give time to the teacher to consider how best to implement his or her career plans. The second is to inform the teacher as to the character of the teacher's work, so that the teacher will be able to make his or her services acceptable and productive.²⁶

The following is the author's recommended procedure for requiring a third year of probation, which comports with logical administrative and professional expectations and satisfies the minimum requirements of the statute as interpreted by the Court in Amato. In addition, I recommend that Justice Williams's advice be followed.

1. Administrative staff meets with the teacher to discuss evaluations. After further consultation, the teacher is informed that the administrator and superintendent will recommend a third year of probation based on reasons set forth in writing to the teacher.
2. Board of education adopts resolution granting third year of probation for the benefit of the teacher because the teacher's work is not entirely satisfactory and does not justify an award of tenure. The specific reasons for the third year probation were those which had been discussed with the teacher by the administrative staff and provided in writing to the teacher.
3. A copy of the board's resolution is mailed to the Tenure Commission and the teacher. The teacher is also given a copy of the Teachers' Tenure Act.
4. All of the above actions occur more than sixty days before June 30.

NON-REEMPLOYMENT OF PROBATIONARY TEACHERS: NOTICE AND EVALUATION REQUIREMENTS

If it decides not to reemploy a probationary teacher, the board of education must at some time within sixty days before the close of the school year furnish the teacher with a written statement that his teaching has been unsatisfactory.²⁷ Because the law is not specific on this point, the written evaluation of the teacher's work may or may not be included with the nonrenewal notice, at the discretion of the board of education. It is advisable, however, to include the statement of unsatisfactory work and the nonrenewal notice in the same letter.

²⁶Id. at 536, 266 N.W.2d at 450.

²⁷MCLA 38.83; MSA 15.1983.

It was not the legislature's intent to permit the arbitrary dismissal of probationary teachers by a controlling board. It must be concluded that the sixty day notice of non-reemployment cannot be used without cause, but must have some connection with the quality of the teacher's services. If the controlling board could dismiss a probationary teacher arbitrarily, with no consideration of quality, it could prevent any teacher, even one evaluated as satisfactory, from acquiring tenure simply by giving sixty days notice.²⁸

The Michigan courts have had some difficulty interpreting the statutory requirement that the "controlling board shall provide the probationary teacher with a definite written statement as to whether or not his work has been satisfactory."²⁹

One case involved the question of whether a statement of unsatisfactory work was absolutely mandated by statute upon discharge or whether a school board under certain circumstances could discharge a probationary teacher even if the work was good.³⁰ The plaintiff was employed as a probationary teacher for two school years. In November and January of the school year, plaintiff was evaluated and rated satisfactory. In February, he received a letter informing him that he would not be offered a contract for the next school year.

The school board admitted that the teacher's work was satisfactory but claimed that a "satisfactory" rating does not automatically guarantee continued employment. The Court of Appeals adopted the school board's interpretation,³¹ and the Supreme Court affirmed,³² but Justice Kavanaugh dissented, holding that the absence of the mandated written notice precluded the board from discontinuing his employment. He emphasized that it was necessary for the school board to follow the letter of the law.³³

²⁸ *Munro v. Elk Rapids Sch.*, 385 Mich. 618, 189 N.W.2d 224 (1971).

²⁹ MCLA 38.83; MSA 15.1983 (emphasis added).

³⁰ *Munro v. Elk Rapids Sch.*, 17 Mich. App. 368, 169 N.W.2d 527 (1969); *aff'd* 383 Mich. 661, 178 N.W.2d 450 (1970), *rev'd on rehearing* 385 Mich. 618, 189 N.W.2d 224 (1971).

³¹ 17 Mich. App. 368, 169 N.W.2d (1969).

³² 383 Mich. 661, 178 N.W.2d 450 (1970).

³³ *Id.* at 691, 178 N.W.2d at 464.

One year later, Munro was reargued, and the Michigan Supreme Court adopted Justice Kavanaugh's dissent, stating: "(W)e hold that under the statute, unless a probationary teacher is notified in writing that his work is unsatisfactory, upon completion of his probationary period he is entitled to employment with tenure status with all of its special privileges."³⁴

The Supreme Court later referred to its second Munro decision in Weckerly v. Mone Shores Board of Education and stated:

We have held that if no written statement is provided, the statute requires it 'shall be considered as conclusive evidence that the (teacher's) work is satisfactory.' We have also held that if the written statement that a contract would not be renewed fails to state whether or not the teacher's work had been satisfactory, the written statement does not meet statutory requirements.³⁵

Notice of Reason for Nonrenewal

The question remained as to whether a board was required to spell out the reasons for unsatisfactory service. In Lipka v. Brown City Schools,³⁶ an evenly divided Supreme Court affirmed an Appeals Court decision that a definite written statement concerning the quality of a probationary teacher's work requires a statement of the reasons for the board's conclusion that the teacher's work was unsatisfactory. On rehearing, a Supreme Court majority held that the provisions of the Teacher's Tenure Act requiring the school board to give written notice to probationary teachers of unsatisfactory work does not include a mandate that a statement of reasons accompany that notice.³⁷ It is unnecessary to read a "reason" requirement into the provision in order to effect the policy included in the Tenure Act. Justice Kavanaugh, writing for the majority, stated: "The Act's provisions, MCL 38.83; MSA 15.1983, that the board give written notice to probationary teachers of unsatisfactory work does not include a mandate that a statement of reasons accompany that notice. I find it unnecessary to read a 'reason' requirement into the provision in order to effect the Act's policy."³⁸

³⁴ 385 Mich. 618, 619-620, 189 N.W.2d 224, 225-226 (1971).

³⁵ 388 Mich. 731, 734, 202 N.W.2d 777, 779 (1972).

³⁶ 399 Mich. 704, 252 N.W.2d 770 (1970).

³⁷ Lipka v. Brown City Sch., 403 Mich. 554, 271 N.W.2d 771 (1978).

³⁸ Id at 558, 271 N.W.2d at 773.

In the notice to the probationary teacher that his work is unsatisfactory, the board of education is not required to spell out its reasons, list the specific causes for nonrenewal, or particularize the basis for its unsatisfactory evaluation. A simple, timely written notification that the teacher's work is unsatisfactory is in compliance with the statute. It is neither arbitrary nor capricious to refuse to reemploy a probationary teacher without giving specific reasons for that decision, except that his work is unsatisfactory. The very reason for the probationary period is to give the board a chance to evaluate the teacher without making a commitment to rehire him. Had the legislature intended to require that boards of education set forth the details of why the work was unsatisfactory, it could have and would have done so.³⁹

A decision not to grant tenure is implied in the timely nonrenewal notice which states the reason as unsatisfactory service. While the foregoing may fulfill the requirements of the Tenure Act, it is the author's opinion that the teacher's supervisor should hold a private conference with the teacher and state the reasons for termination of the teacher's services. In fact, as a matter of professional administrative responsibility the teacher ought to be provided with a written explanation, in some detail, of the reasons for nonretention. The administrative time required is small and the value to the teacher is great. Additionally, in view of the uncertainty of future court decisions in this area,⁴⁰ school boards, and administrators, should state their reasons for nonrenewal. Good practice requires that the judgement of nonrenewal be based on fact and reasoned analysis. This view is supported by the Michigan Court of Appeals: "Reason for substantial notice plainly exists when a teacher's livelihood and reputation are at issue. Such protection (the notice) is necessary to allow the probationary teacher to prepare and present an adequate defense in a situation where future employment may depend upon challenging an adverse evaluation of competence."⁴¹

A definite written statement advising a probationary teacher of his deficiencies serves to assist him in self-improvement or self-correction. If a board states only a conclusion that a teacher's work is unsatisfactory, a major objective of evaluation is defeated.

³⁹ Id.

⁴⁰ The dissenters in *Lipka v. Brown City Sch.*, 403 Mich. 554, 271 N.W.2d 771 (1978) call attention to the general uncertainty of the law in this area. Id. at 567, 271 N.W.2d at 776.

⁴¹ *Boyce v. Royal Oak Bd. of Educ.*, 76 Mich. App. 526, 531, 257 N.W.2d 153, 156 (1977).

Role of the School Board in Non-Reemployment

The decision not to reemploy a probationary teacher must be made at a legally called public meeting of the school board. It is the controlling board that must also provide the definite written statement of nonrenewal, although administrative personnel may execute the action. An administrator's evaluation, given without the board's legal approval, does not meet the requirements of the statute even if the evaluation reflects favorably on the teacher. A verbal, rather than a written communication delivered by an administrator subsequent to a legal board resolution, does not fulfill the requirements of the Act. Even if the teacher attended the board meeting at which the decision was made to terminate him, the notice provision would not be fulfilled. When a Michigan school board at an "executive session" directed its personnel director to send the sixty-day notice letter "if" the school administrator still viewed the plaintiff's performance as unsatisfactory, the action of the board was held not to be in sufficient compliance with the statute. Final action, it was ruled, can be taken by a school board only in a public meeting, not in an executive session. In the same case the court ruled that a school board, at a public meeting, could not legally ratify the personnel director's notice of termination when the board meeting was held less than sixty days prior to the close of the school year.⁴²

The majority vote of the full membership of the board is required for non-reemployment.⁴³ The controlling board is not required to announce its action publicly or to incorporate its reason in the school board minutes.⁴⁴ It is strongly recommended that specific reasons for terminating a probationary teacher never be discussed publicly.

⁴²Fucinari v. Dearborn Bd. of Educ., 32 Mich. App. 108, 188 N.W.2d 229 (1971).

⁴³MCLA 380.1201; MSA 15.41201. Unless the statutes specify otherwise, all board decisions are made by majority vote of the full membership of the board. If only five members of a seven-member board are in attendance, four favorable votes of the five would be required to adopt a resolution.

⁴⁴Dryden v. Marcellus Sch., 401 Mich. 76, 257 N.W.2d 79 (1977), rev'ing 73 Mich. App. 40, 250 N.W.2d 782 (1976), denied, 401 Mich. 955 (1977). In Dryden v. Marcellus Bd. of Educ., 73 Mich. App. 250 N.W.2d 782 (1976), the Court of Appeals held that school boards must publicly state reasons for terminating a probationary teacher. In Andersen v. Adrian Sch. Dist., 73 Mich. 33, 250 N.W.2d 786 (1976), the Court of Appeals held that the Teachers' Tenure Act does not require that the reasons for denying tenure or extending probation be spelled out at a public meeting. The conflicting opinions of the Appeals Court Panel were reconciled by the Supreme Court in Dryden.

Controversies concerning the rights of probationary teachers under the Tenure Act have centered on two main issues: timeliness of notice and delivery of notice.

Timeliness of Notice

The courts have been called upon to construe the exact meaning of the phrase "60 days before the close of the school year" as used in the Tenure Act.⁴⁵ Until August, 1976, the Teacher Tenure Commission, the Michigan Supreme Court, and the Court of Appeals were in agreement that the required sixty-days notice dated from the day school actually closed and the final day the teacher was required to perform his regular professional service for the school district.⁴⁶ However, the Michigan Supreme Court, in Ajluni v. West Bloomfield Bd. of Educ.,⁴⁷ held the "close of the school year" in all Michigan school districts to be June 30 and stated:

To consider the close of the school year as June 30 provides the best result in construing the teacher Tenure Act as a whole. The trial Court based its decision on MCLA 340.353; MSA 15.3353,⁴⁸ which states that the school year in all districts shall commence on the first day of July. Although this does not compel as a matter of law that the last day of the school year be June 30th, such a conclusion is reasonable and supported by common sense. It also has the salutary effect of providing certainty to all parties every year of the date by which notice must be given.⁴⁹

The technique of counting the sixty required days may be ascertained from one of the decisions of the Court of Appeals. (Even though the case is pre Ajluni it is nevertheless instructive). In that particular case the last day of the school year was June 7, and the court stated that the sixtieth day before the close of that school year was

⁴⁵MCLA 38.83, MSA 15.1983.

⁴⁶Ajluni v. West Bloomfield Sch. Dist., 59 Mich. 213, 229 N.W.2d 385 (1975); Weckerly v. Mona Shores Bd. of Educ., 388 Mich. 731, 202 N.W.2d 777(1972); Fecinari v. Dearborn Bd. of Educ., 32 Mich. App. 108, 188 N.W.2d 229 (1971); Carlk v. Grosse Pointe Bd. of Educ., TTC 70-22.

⁴⁷397 Mich. 462, 245 N.W.2d 49 (1976).

⁴⁸Statute citation now MCLA 380.1133; MSA 15.41133.

⁴⁹Ajluni v. West Bloomfield Bd. of Educ., 397 Mich. 462, 465, 245 N.W.2d 49,50 (1976).

April 9, 1968. The court concluded that a certified letter mailed on April 8th, 1968, satisfied the sixty-day requirement.⁵⁰ The day of delivery can be counted as one of the sixty days. Since, under present law, the close of the school year is June 30, the last day actual and certain delivery and receipt of written notice can be given to any probationary teacher in Michigan is May 1.

Delivery of Notice

The Teachers' Tenure Act is silent as to the manner of sending notice of nonrenewal to a probationary teacher. The Michigan Supreme Court has stated: "The written notice could have been hand delivered, mailed by regular mail or mailed as certified or registered mail; any one of these methods would have been acceptable under the statutory language. Certified or registered mail would give the board concise, and ready proof of delivery of the written notice."⁵¹

The school district has the burden of proving that it has actually delivered the notice to the teacher within the legally required time limit. Therefore, hand delivery or certified or registered mail delivery are highly recommended in order to ensure delivery to the teacher. In one case, a teacher was reinstated with tenure when the school board's nonrenewal notice was mistakenly delivered to his previous year's address and he never received it.⁵²

As stated previously, the actual delivery date, rather than the date of mailing, is controlling in satisfying the statutory requirement of providing written notice sixty days before the close of the school year. In the case of *Weckerly v. Bd. of Educ. Mona Shores*,⁵³ a school board mailed a dismissal notice to one of its probationary teachers' by

⁵⁰ *Weckerly v. Mona Shores Bd. of Educ.*, 28 Mich. App. 243, 184 N.W. 2d 323 (1970) rev'd on grounds that date of mailing termination notice was not controlling in satisfying requirement of MCLA 38.83; MSA 15.1983 that probationary teacher shall be employed unless the board shall at least sixty days before the close of the school year provide the teacher with a definite written statement as to whether or not his work has been satisfactory. The actual date of receipt is the controlling date. *Weckerly v. Mona Shores Bd. of Educ.*, 388 Mich. 731, 202 N.W.2d 777 (1970).

⁵¹ *Weckerly v. Mona Shores Bd. of Educ.*, 28 Mich. App. 243, 246, 184 N.W.2d 323, (1970) rev'd on other grounds, 388 Mich. 731, 202 N.W.2d 777 (1972).

⁵² *Karabetsos v. School Dist. of E. Detroit*, 17 Mich. App. 10, 168 N.W.2d 654 (1969).

⁵³ 388 Mich. 731, 202 N.W.2d 777 (1970). The teacher was also orally notified that she would be terminated.

certified mail and the mail carrier attempted to deliver the letter timely. The teacher was not home and the mail carrier left a mail arrival notice. The teacher found the mail arrival notice several days later and picked up the letter at the post office. The Court held that the actual delivery of the letter occurred when the teacher picked up the letter at the post office. In this instance, the delivery was found to be too late and the teacher was reinstated.

Failure to Provide Notice

According to the Act, if a board of education fails to provide a probationary teacher with a timely written statement as to whether his work is satisfactory, its failure to do so "... shall be considered as conclusive evidence that the teacher's work is satisfactory. . ."⁵⁴ Failure of the school board to so notify a properly certified teacher at the end of his first year's probationary service constitutes an automatic granting of a second year of probationary service.⁵⁵ If the board of education fails to notify the teacher that his work is unsatisfactory at the close of the second year of probationary service, tenure will be automatically granted.⁵⁶ The same holds true for teachers serving a third year of probationary service.

When a board of education failed to follow the statutes, the Michigan Supreme Court said:

We have noted that the teacher was given no written statement before the close of the first or second school years as to whether or not her work was satisfactory. In this situation the statute is clear: such failure, it provides, "shall be considered as conclusive evidence" that the work is satisfactory. The result of the above is that the teacher has satisfactorily completed the probationary period, is entitled to the status of tenure, and may not be dismissed save for reasonable and just cause. . . .⁵⁷

⁵⁴ MCLA 38.83; MSA 15.1983.

⁵⁵ Wilson v. Flint Bd. of Educ., 361 Mich. 691, 106 N.W.2d 136 (1960).

⁵⁶ Munro v. Elk Rapids Sch., 385 Mich. 618, 189 N.W.2d 224 (1971) in which the Michigan Supreme Court reversed an earlier decision in Munro v. Elk Rapids Sch., 383 Mich. 661, 178 N.W.2d 450 (1970).

⁵⁷ Wilson v. Flint Bd. of Educ., 361 Mich. 691, 696, 106 N.W.2d 136, 138 (1960).

Thus, a teacher cannot be deprived of tenure status because of inaction by the board of education or because of the nonexistence of a written tenure contract.⁵⁸ Furthermore, a board cannot refuse to reemploy a teacher even if it sends him a nonrenewal of contract notice sixty days prior to the close of the school year unless it has provided him with a statement that his work is unsatisfactory.⁵⁹

Hearing and Appeal Rights

A probationary teacher who has been properly notified that his work is unsatisfactory and that he will not be reemployed for the ensuing year is not entitled to a hearing before the board of education. Michigan statutes do not permit the right of appeal to the Tenure Commission from the action of school authorities in notifying a probationary teacher that he is not to be reemployed.⁶⁰ However, if there is a question as to whether the teacher has probationary or tenure status, the teacher may appeal to the Tenure Commission.⁶¹ If the Commission determines that the teacher is a probationary teacher, it would have no jurisdiction to review the board's reason for judging the work to be unsatisfactory.⁶²

Probationary teachers have no federal constitutional right to procedural due process on nonreemployment for unsatisfactory service since there is no inherent property right in a nontenured teaching position. With a few important exceptions, the probationary teacher who has been terminated has no recourse by way of an administrative hearing or the courts.

⁵⁸ 1958, pt. 2, p. 265, OAG No. 3297, October 15, 1958. The Michigan School Code (380.1231) requires that contracts with teachers shall be in writing. But if a teacher is entitled by the Teachers' Tenure Act to tenure status, the controlling board could not deprive him of a position by refusing to issue an individual teacher's contract.

⁵⁹ *Munro v. Elk Rapids Sch.*, 385 Mich. 618, 189 N.W.2d 224 (1971).

⁶⁰ MCLA 38.84; MSA 15.1984. *Fucinari v. Dearborn Bd. of Educ.*, 32 Mich. App. 108, 188 N.W.2d 229 (1971).

⁶¹ *Lipka v. Brown City Sch.*, reh., 403 Mich. 554, 271 N.W.2d 771 (1978). "If a teacher claims tenure as a result of unsatisfactory completion of probation, the determination of timeliness or legal effect of a notice of unsatisfactory work is always within the jurisdiction of the Tenure Commission." *Id.* at 560, 271 N.W.2d at (emphasis added).

⁶² *Id.* 403 Mich. 554, 271 N.W.2d 771 (1978).

Probationary Teachers Potential Federal Rights

We have previously stated that a probationary teacher is not entitled to a hearing before the board of education when the true reasons for the termination are for unsatisfactory work (improper job performance). A probationary teacher has not derived a property interest under the Teachers' Tenure Act since there is no guarantee of future employment. However, the application of the Teachers' Tenure Act is subject to the basic requirement that it must not violate the Federal Constitution, as amended, including the Bill of Rights and Federal Statutes. In all cases, the Federal Constitution and its interpretation by the federal judiciary controls state action, and every teacher has the right not to be punished by a board of education in such a way as would violate his constitutional rights.⁶³

The U.S. Supreme Court held that the fourteenth amendment requires an opportunity for a hearing prior to the nonrenewal of a nontenured teacher's contract if the nonrenewal deprived him of an interest in "liberty" or "property."⁶⁴ Under these limited circumstances, school board hearings for termination of probationary teachers are required.

The Liberty Interest. In *Bd. of Regents v. Roth*⁶⁵ the Court held that a state colleges' refusal to renew a nontenured teacher's employment contract did not implicate a liberty interest. The Court stated:

The state, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community. It did not base the nonrenewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality. Had it done so, this would be a different case. For '[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and opportunity to be heard are essential.'

* * * * *

⁶³Perry v. Sinderman, 408 U.S. 593 (1972). Reprisal for any constitutionally protected right would require a due process hearing before the board of education. See *Shelton v. Tucker*, 364 U.S. 479 (1960); *Keyishan v. Board of Regents*, 385 U.S. 589 (1967).

⁶⁴*Bd. of Regents v. Roth*, 408 U.S. 564, 569 (1972).

⁶⁵*Id.*

Similarly, there is no suggestion that the State, in declining to re-employ the respondent, imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities. . . . Had it done so, this, again, would be a different case.⁶⁶

Allegations of inadequate job performance or incompetence do not impune one's good name, reputation, honor or integrity to the extent that one's community standing is seriously harmed.⁶⁷ An individual has a protected liberty interest if state action forecloses that person's freedom to take advantage of other employment opportunities.⁶⁸ In explaining the type of foreclosure of future employment opportunities would implicate a liberty interest, the Supreme Court in Roth stated:

The State, for example, did not invoke any regulations to bar the respondent from all other public employment in state universities. Had it done so, this again would be a different case. For '[t]o be deprived not only of present government employment but of future opportunity for it certainly is no small injury. . . .'⁶⁹

The applicability of the Roth protection from job foreclosure is not limited to situations where the state formally and completely deprived a person of future employment. When the state has published allegations that are so serious and derogatory in nature that future employment is effectively foreclosed because of these allegations, courts have mandated procedural due process. If an employee is terminated for dishonesty, moral unfitness, manifest racism, serious mental illness, lack of intellectual ability, or for committing a serious felony and if the termination for such reason means that future employment will be foreclosed, the employee must have an opportunity to challenge the allegations.⁷⁰ However, courts generally have not demanded due process hearings when employees were terminated because of the employee's inability to adequately perform his job.⁷¹

⁶⁶ *Id.* at 573-574.

⁶⁷ *Lake Michigan College Federation of Teachers v. Lake Michigan Community College*, 518 F.2d 1091, 1097 (6th Cir. 1975), cert denied, 427 U.S. 904 (1976); *Dee Swain v. Bd. of Trustees* 466 F. Supp. 120 (N.D. Ohio 1979).

⁶⁸ *Bd. of Regents v. Roth*, 408 U.S. 564 (1972).

⁶⁹ *Id.* at 573-74.

⁷⁰ *Dee Swain v. Bd. of Trustees*, 466, F. Supp. 120, 123 (N.D. Ohio 1979).

⁷¹ *Id.* at 124.

The Property Interest. A probationary teacher has no property interest in continued employment. The Supreme Court stated in Roth that: "To have a property interest is a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead have a legitimate claim of entitlement to it."⁷²

Probationary teachers in Michigan have no statutory right to re-appointment; therefore they have no property interest in reappointment.

Resignation at the End of Probationary Period and Tenure Status

Sometimes a second year probationary teacher resigns his position in a school district sixty days or more prior to the end of the school year, effective at the close of the school year. He does so either on his own initiative or at the request of the school district. If the board of education has not given timely notice to the resigning teacher that his work is unsatisfactory and that his contract will not be renewed, a question arises regarding the tenure status of the teacher when employed by another district. It appears possible that such a teacher could be regarded as a tenured teacher, and if employed in another district he must be granted tenure or be required to serve only one year on a probationary basis. This question has not been resolved by the Attorney General or the courts but in King v. Sumpter School District,⁷³ the Tenure Commission held that when the controlling board failed to notify a second year probationary teacher that she would not be reemployed, the teacher achieved tenure status even though there was a possibility she may have resigned prior to the sixty-day period.

DISMISSAL OF A PROBATIONARY TEACHER DURING THE SCHOOL YEAR

The services of a teacher during the probationary period are usually on the basis of an annual contract. It is sometimes necessary for a controlling board to terminate a probationary teacher mid-year on grounds that the teacher's conduct or effectiveness is so inadequate as to constitute a breach of contract. The Tenure Act does not include procedures for discharge of a probationary teacher before the contract expires.

⁷²Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972).

⁷³TTC 67-9. The Board of Education claimed the teacher had resigned but was unable to substantiate the claim. The teacher claimed she had not resigned. She did, however, before the Commission, waive reinstatement.

The stigma that attaches to a mid-year termination of a nontenured teacher is sufficiently injurious to require a hearing even though the hearing is not accorded by statute. Since the teacher has a property right inherent in his contract, the constitutional requirement for due process operates to overcome any lack of statutory procedural requirement.

As a general rule, in the absence of statutory authority or a provision in a teaching contract, a school district is not justified in dismissing a teacher without compensation prior to expiration of the contract.⁷⁴ Dismissal during the school year of a probationary teacher with a full year contract must be for "reasonable and just cause" only. The teacher is entitled to procedural due process of law.⁷⁵ The basic procedures recommended for dismissing probationary teachers in midyear are generally those required for dismissal of tenured teachers.

A probationary teacher has no statutory right to appeal a mid-year dismissal to the Tenure Commission⁷⁶ but he may appeal to the circuit court as provided by the state constitution:

All final decision, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasijudicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the determination whether such final decisions, findings, rulings, and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record.⁷⁷

There is also statutory provision for such an appeal:

An appeal shall lie from any order, decision or opinion of any state board, commission or agency, authorized under the laws of this state to promulgate rules and regulations from which an appeal or other judicial review has not heretofore been provided by law, to the circuit court of the county of which the appellant is a resident. . . .⁷⁸

⁷⁴ *Bruinsma v. Wyoming Public Schools*, 38 Mich. App 745, 197 N.W.2d 95 (1972).

⁷⁵ *Lucia v. Duggan*, 303 F. Supp. 112 (D. Mass. 1969).

⁷⁶ MCLA 38.84; MSA 15.1984.

⁷⁷ MICH. CONST. art. 6, § 28 (1963).

⁷⁸ MCLA 600.631; MSA 27A.631

The circuit court has the authority to review the transcript of the hearing held before the board of education to assure that the teacher was granted a fair hearing. When appeal from the board decision is made to the court, the court does not review the evidence, weigh it, or enter judgment. The court will not take additional testimony nor submit the question to a jury. The court's major purpose will be to determine whether the board of education "acted corruptly, in bad faith, or in a clear abuse of its powers."⁷⁹ If the board of education acts within its scope of authority, and its action is neither unreasonable or arbitrary, there is no basis for judicial interference.

Termination of services by the board following an appropriate hearing before the end of the contract period is not a breach of contract, if the dismissal was justified. But if the teacher's dismissal cannot be sustained in the court, the school board has illegally revoked the contract and is subject to an action to collect damages.

The case of Caddell vs. Ecorse Board of Education⁸⁰ provides an excellent legal example of the dismissal of a teacher during the term of his contract. A probationary teacher was suspended for violating school rules and regulations. At a hearing about six weeks later he was dismissed, and his contract was terminated on the grounds that he was absent from duty without reporting his absences, for being tardy, and for falsifying sign-in times. The circuit court and the Court of Appeals found that adequate grounds had been given for the dismissal and that the board had acted within the scope of its authority.

⁷⁹Finch v. School District, 225 Mich.674, 196 N.W.2d 532 (1924).

⁸⁰17 Mich App 632, 170 N.W.2d 277 (1969).

CHAPTER III

DISCHARGE AND DEMOTION OF TENURED TEACHERS

PROCEDURES

Procedures for discharge¹ or demotion of tenured teachers are provided in Article IV of the Michigan Teachers' Tenure Act and are mandatory. There may be no material deviation from these procedures; the discharge or demotion of a tenured teacher can be accomplished only by strict compliance with the procedural safeguards of the Act.²

Suspension

A board of education has the authority to suspend a teacher from active performance of duty until his future status has been decided. However, the tenured teacher's salary continues during the suspension period and stops only when the controlling board decides to release the teacher³ or when the teacher resigns. The purpose of this requirement is to protect the teacher from loss of pay and financial hardship as the result of the bringing of frivolous charges.⁴ A suspension of a

¹As used in this section, the word discharge does not include layoffs.

²Lawson v. Wayne Community Sch. Dist., 63 Mich. App. 57, 233 N.W.2d 713 (1975); Biberstine v. Port Austin Sch. Dist. No. 9, 51 Mich. App. 274, 214 N.W.2d 729 (1974); Wright v. Port Huron Area Schools, 13 Mich. App. 1, 163 N.W.2d 673 (1968).

³MCLA 38.103; MSA 15.2003 "(T)he controlling board may suspend the accused teacher from active performance of duty until a decision is rendered by the controlling board, but the teacher's salary shall continue during such suspension." A teacher is entitled to be paid wages from date of suspension to date of termination of employment. (Caddell v. Ecorse Bd. of Educ., 17 Mich. App. 632, 170 N.W.2d 277 (1968).

⁴Mullally v. Trenton Bd. of Educ., 13 Mich. App. 464, 164 N.W.2d 742 (1968).

tenured teacher without pay is deemed to be a demotion which demands a full due process hearing.

Should the teacher appeal the board's discharge decision and the board is ordered to reinstate him, the board might be required to pay the teacher for the entire period he did not teach.⁵ If the board's attempt to discharge a tenured teacher is sustained on appeal it would be obligated to pay the teacher only for that period he was suspended.

Fair Dismissal Procedures--A Professional Point of View

The information presented here is not intended to convey to teachers, administrators, or school board members that every teacher dismissal is professionally correct if it is legally correct. Educators should look beyond the strict interpretation of the law for fully adequate dismissal procedures. The NEA Committee on Tenure and Academic Freedom has prepared an important statement which embodies a professional approach appropriate to the dismissal of teachers. We reproduce their statement here in its entirety.

FAIR DISMISSAL PROCEDURES FOR A SCHOOL SYSTEM

Every board of education should have a written policy for fair dismissal. The policy should be democratically drawn up, known to every employee and respected by both employer and employee. It should apply to both beginning and experienced teachers.

Fair dismissal practices mean: (1) That an employing board may with justice dismiss or not re-employ school personnel; (2) that employees may be dismissed or not be re-employed only after fair practices have been followed.

Fair dismissal practices should be followed regardless of the length of employment or the existence or absence of statutory requirements.

Fair dismissal practices would include the following:
 -When any action or other matter appears to exist which may possibly result in the future dismissal of an employee, the situation should be brought promptly to the attention of the employee involved.

⁵MCLA 38.103; MSA 15.2003. The "mitigation doctrine" is applied in determining the amount to be paid the teacher. Wages a teacher actually earns or could have earned are deducted from the suspended teacher's salary in arriving at the net or actual amount of salary lost. *Shiffer v. Gibraltar Schools*, 393 Mich. 190, 224 N.W.2d 255 (1974).

- Every helpful effort should be made, especially by those in an administrative or supervisory relationship, to aid the employee to correct whatever appears to be cause for potential dismissal.
- Except in extremely serious circumstances, the employee should be given sufficient time for improvement.
- Any charges of undesirable traits or practices should be bona fide, verifiable, and clearly stated to the employee in writing. These charges should be based upon reports made by supervisors and administrators concerning the employee's ability to perform his duties. The information in these reports should be made known to the employee. Terminology such as "for the good of the school," "disloyal," or "he knows why" should be avoided. Any employee thus charged should have a fair opportunity to explain or otherwise defend himself.⁶

REASONS FOR DISCHARGE OR DEMOTION OF TENURED TEACHERS

The Teachers' Tenure Act provides the broad standard for discharging or demoting a tenured teacher: "Discharge or demotion of a teacher on continuing tenure may be made only for reasonable and just cause."⁷

Need for Pre-Established Objective Criteria for Judging Teachers

The term "reasonable and just cause" presumes that some identifiable standard of conduct or evaluative criteria exist to the extent that the teacher is notified of the conduct which is required. However, the legislature has not developed or required specific standards of conduct or evaluative criteria nor has it required that tenured teachers be evaluated. Until recently, little could be gleaned from court decisions to explain reasonable and just cause. A panel of the appeals court noted that "Although just and reasonable cause is crucial to the teachers' tenure scheme, this concept has received little judicial explanation in this jurisdiction."⁸

⁶National Education Association, Commission of Professional Rights and Responsibilities, Fair Dismissal Procedures for a School System, (1965)

⁷MCLA 38.101; MSA 15.2001 (emphasis added).

⁸Beebe v. Haslett Bd. of Educ., 66 Mich. App. 718, 723, 239 N.W.2d 724, 727 (1976).

The need for standards was well stated by Judge Kaufmann in Beebe v. Haslett Board of Education.

Specifically enunciated 'professional standards' should be used to adjudge the teacher's fitness. These standards should be clear to teachers so that they may serve to both guide and judge them. Adjudication should be a product of ongoing contact, observation, and published judgments by numerous persons of different backgrounds and expertise. Frequently, a teacher will be deemed lacking in some abilities and capable in other areas. In such a case, the judgment of his quality will involve a determination of priorities, of which disciplines are more important to the school than others. Such priorities should, too, be carefully enunciated. The definition of goals and objectives as well as working dialogue will be products of an ongoing evaluation and enunciation of standards.⁹

The need for prior performance expectations has been expressed by arbitrators.¹⁰ In a matter where it was held that probationary teachers were impermissibly terminated, it was stated:

The arbitrator has made his findings herein based upon a principle that just cause essentially means that there be reasonable standards that the employees, supervisors and the administration are aware of and recognize as applicable; that there be notice to employees of where they stand so that the evaluation process means something. . . Here there were no definitive standards conveyed to the supervisor that could be relayed to the affected employees. Here there were no overall assessments of the employees' career with the district. Here judgments were made with no apparent standards or basis in the overall picture of the employee's performance. . . This taken with the failure to warn or advise the grievants. . . has to lead to the findings there was not just cause for their terminations.¹¹

⁹ 66 Mich. App. 718, 726, 239 N.W.2d 724, 729 (1976).

¹⁰ Teacher evaluation standards and collective bargaining laws are interrelated. The Michigan Supreme Court has held that a public employer (in this case, a university) may not unilaterally adopt a teacher effectiveness evaluation program. It is a mandatory subject of collective bargaining since it is a condition of employment and focuses on the effect the evaluation has on the employees' status. Central Michigan University Faculty Ass'n. v. Central Michigan University 404 Mich. 268, 273 N.W.2d 21 (1978).

¹¹ Peekskill City Sch. Dist. (N.Y.) and Peekskill Teachers' Association, Aarons, October 17, 1974.

It is reasonable to assume that a school board must have in mind some predetermined performance standard against which to measure teachers' fitness to teach when it approves charges against a teacher and upholds the charges. Some conduct is so clearly wrong that prior specific reference is not necessary. Under certain circumstances, discipline or discharge may be warranted on the basis of "reasonable and just cause" without reference to pre-established objective criteria.¹² Conduct that is repugnant to the minimum standards of honesty and integrity requires no prior notice.

Absent the "specific enunciated professional standards" recommended by Judge Kaufmann, or legislative or judicial explanation of "reasonable and just cause," local school boards and the Tenure Commission have relied on their own best judgment, making decisions on a case-by-case basis as if there existed commonly understood standards of performance for the profession. Unfortunately, teachers, administrators and school boards have been required to resort to abstract standards from their own experiences, from the literature, legal references,¹³ and decisions of the Tenure Commission and the courts.

Role of the Board of Education

Most of the legal provisions for dismissing teachers are discussed elsewhere in this volume. Statutes, court interpretations, and attorney general's opinions offer excellent procedural guidelines for the school

¹²For example: "The Board has the right to expect a professionally trained teacher to exercise good judgment in student discipline without specific statements forbidding the use of baby rattles around the necks of eight-year old students for failure to complete work assignments." Warren Woods Pub. Sch. (Mich) and Warren Woods Educ. Assoc., Keith Grotz, Arbitrator, "Arbitration in the Schools," 52-2.

¹³See Annot., Use of Illegal Drugs as Ground for Dismissal of Teacher, or Denial or Cancellation of Teacher's Certificate, 47 ALR 3d 754 (1973); Dismissal of, or Disciplinary Action Against, Public School Teacher for Violation of Regulation as to Dress or Personal Appearance of Teachers, 58 ALR 3d 1227 (1974); Dismissal or Rejection of Public School Teacher Because of Disloyalty, 27 ALR 487 (1969); What Constitutes "Incompetency" or "Inefficiency" as a Ground for Dismissal or Demotion of Public School Teachers, 4 ALR 3d 1090 (1965); Sexual conduct as Ground for Dismissal of Teacher or Denial or Revocation of Teaching Certificate, 78 ALR3d 19 (1977); What Constitutes "Insubordination" as Ground for Dismissal of Public School Teacher, 78 ALR3d 19 (1977); Dismissal of Public School Teacher Because of Unauthorized Absence or Tardiness, 78 ALR3d 117 (1977); Rosenberger & Plimpton, Teacher Incompetencies and the Courts, 4 J. L. & Educ. 469 (1975).

board to follow in deciding whether to retain or dismiss a tenure teacher.

Whenever a controlling board dismisses a tenured teacher, it faces the possibility of an appeal of the decision to the Tenure Commission. The ultimate outcome of the board's decision is in doubt until the teacher decides whether to appeal or until the Tenure Commission renders a decision. If the Commission reverses the board and orders the teacher reinstated, the school district can appeal the Commission's order to the court or reinstate the teacher. If the teacher is reinstated, the school district may be obligated to pay any money the teacher might have earned had he actually taught.

Because of the possible damage to the teacher's reputation and the financial risk involved to the school district, a board of education should enter into dismissal proceedings of a tenured teacher with caution and only on strong recommendations of its chief administrative officer, the person filing the charges, and legal counsel. The board members should expect that the teacher will appeal a dismissal action and should be prepared to defend its decision before the Tenure Commission.

Tenure laws do not prevent the dismissal of incompetent teachers; the procedures to follow, however, are complex. The teacher may muster support from inside and outside the schools. Students frequently become involved. It becomes a public issue. A school administrator may be reluctant to face a dismissal proceeding because he may be put in the position of defendant during cross examination. The school board must lend its fullest support to a school administrator who assumes the burden of facing a dismissal proceeding of an incompetent or immoral teacher.

It can be reasonably expected from a review of past cases that the Tenure Commission will uphold the dismissal of a teacher, provided that what is expected of the teacher has been communicated to him and there is irrefutable evidence to show he has been sufficiently warned of his inadequacies, and that he has been given professional assistance to improve his teaching. The school board's policy should set forth clearly the board's expectations of its teachers. This may be accomplished by a well written teachers' handbook or master agreement.

Each school board should negotiate a uniform set of written objective evaluation guidelines for use in evaluating professional competency of its certificated personnel.¹⁴ In negotiating written evaluation procedures, the parties should avail themselves of the advice of certificated instructional personnel. The guidelines adopted should include at least:

¹⁴ The Michigan Supreme Court has ruled that teacher evaluation systems must be negotiated. *Central Mich. Univ. Faculty Ass'n v. Central Mich. Univ.* 404 Mich. 268, 273 N.W.2d 21 (1978).

1. Establishment of standards of expected student progress in each area of study and of techniques for assessment of the progress.
2. Assessment of certificated personnel competence as it relates to established standards.
3. Assessment of other duties normally required to be performed by certificated employees as adjunct to their regular assignments.
4. Establishment of procedures and techniques for ascertaining that the certificated employee is maintaining proper control and is preserving a suitable learning environment.

Each school board should provide follow-up counseling of teachers whose competency is not up to standard and assist the teacher to improve. The teacher evaluated should be given an opportunity to append written statements of their views about their evaluation to the evaluation report.

In general, every effort should be made by all concerned to make dismissals as infrequent as possible and to make unfair dismissals impossible. Simple ethics and human fairness transcend any law or absence of legal provision. "Against such there is no law."¹⁵

Michigan teachers' acquired rights of collective bargaining have had significant influence on the development of school personnel policies. Many contracts between school boards and their teachers' organizations reflect policies which go beyond the legal requirements of teachers' tenure rights. Boards of education and teachers' organizations have developed policies related to retention and dismissal of teachers and have reached agreement on clear, definite policies to cover many foreseeable situations, particularly transfer and assignment, and reduction of staff procedures.

Observation and Evaluation

The existence of standards by which teacher performance can be measured cannot alone suffice to satisfy the requirements of the Tenure Act for dismissal on grounds of incompetency. There is an expectation that the teacher's supervisor has observed the teacher's work a sufficient number of times, described the deficiencies found, suggested remedies, and offered assistance. The Tenure Commission has adopted a policy that requires more than informal, occasional surface evaluation. The importance of adequate evaluation as a condition precedent to bringing a successful discharge case is well illustrated in a case in which the Tenure Commission reversed the local school board. In the case of

¹⁵ National Education Association, Commission of Professional Rights and Responsibilities, Fair Dismissal Procedures for a School System (1965).

Chesher v. Coldwater Community Schools,¹⁶ the teacher was formally observed twice by her principal for evaluation purposes, once for an entire day. Following these observations, the principal prepared a written evaluation report, discussed his findings with the teacher, made suggestions, and offered assistance. The principal later visited the teacher's classroom informally, noting that the basic problems were not corrected. The Commission was critical of the principal's conduct following the informal observation:

We note. . . that he failed to discuss with appellant the problem areas he observed during these informal visits, nor did he offer suggestions as to how to improve or strengthen these areas. We believe such discussion and suggestions are mandatory to provide the affected teacher with an opportunity to improve. We believe the use of these informal observations without providing the teacher an opportunity to discuss them is improper. The administration has a duty to discuss with its teachers those problem areas it discovers and to provide the teachers with an opportunity to correct them. The failure to do so should not then be used by the administration as proof of a teacher's deficiency.¹⁷

The Commission held that the testimony against the teacher which was limited to two formal observations failed to establish reasonable and just cause for discharge. This decision follows the Commission's announced policy in Niemi v. Board of Education of Kearsley School District, that a charge of incompetency will not be upheld unless the teacher has been given an opportunity to correct the alleged deficiencies.¹⁸

Role of the School Administrator in Teacher Dismissals

Every building principal and other administrators responsible for personnel supervision should maintain an up-to-date personnel file for each member of the professional staff under their direction. The file should contain a transcript of all undergraduate and graduate credits; proof of certification; a record of employment showing salary, positions held, grades or subjects taught, and number of years employed, including employment in other districts; a record of the days missed because of illness or personal leave and accumulated sick leave, if the district has a sick leave policy; meetings, workshops, seminars, institutes, etc., attended; membership in professional organizations and offices held; honors or special recognitions received; committee assignments; records of conferences held with the teacher about his

¹⁶TTC 75-56-R.

¹⁷Id. at 5.

¹⁸TTC 74-36 at 4.

professional work; and evaluation reports. This list is not intended to be exhaustive; other important items related to the professional profile of the teacher might well be included in the file. The teacher has the right to place items in his own file, and he must be permitted access to review its contents.

The personnel file should be viewed as positive in nature, primarily because its contents will be used to the teacher's advantage far more often than to his detriment. The contents are invaluable to a new administrator in becoming acquainted with his staff, or to any administrator in making assignments, in considering personnel for promotion or salary increases, and in evaluating personnel for special program assignments (e.g., internships, federally sponsored workshops or institutes, etc.), or in providing information for recommending personnel for positions in other school systems or for advanced training programs at universities.

The wise administrator will obtain as much professionally related information about his teachers as he can assemble and have it readily accessible. Teachers know that a good administrator keeps adequate and complete personnel records and does not rely on memory for information about his staff.

A building administrator or some other designated person should hold several "individual" conferences each school year with every teacher under his direction about the teacher's professional work. A written record of the conference should be made and dated; one copy should be given to the teacher and another placed in his personnel file. In a large majority of cases, these conference records will be positive in that they will reflect credit on the teacher and show proof of the teacher's professional competency and advancement.

Occasionally it will be necessary to hold conferences with a teacher whose work has been judged inadequate. Conference records should include clear statements as to the nature and extent of the teacher's inadequacies, what is reasonably expected of the teacher, and the administrator's and supervisor's recommendations for improvement. Follow-up conferences should be held with the teacher. The administrator is professionally obligated to counsel him on several occasions and to provide guidance and assistance. A written record of each conference should be made, stating the purpose of the conference and recommendations for improving the work of the teacher. Again, one copy should be given to the teacher and another retained in his file. Evidence of "constructive evaluation" should appear in the teacher's personnel file. The Bullard-Plawacki Right to Know Act, (P.A. 1978, No. 397) MCLA 423.501 et. seq. which became effective January 1, 1979 permits employees to review their records, prescribes information which may be contained in the records, permits employees to make copies of the records, and authorizes employees to place written materials in the records to correct them.

If the responsible administrator, after making all reasonable attempts to assist in the teacher's professional improvement, judges it

to be in the best interest of the educational program of the school district to dismiss the teacher, the administrator should be able to document the written charges against the teacher. He should be able to cite and describe specific situations which reflect upon the professional incompetency of the teacher. The administrator will need to refer to written conference records to show that the inadequacies have been brought to the teacher's attention, that a reasonable effort has been made to help the teacher correct any deficiencies, and that the teacher nevertheless failed to improve.

A statement such as, "I remember one day last fall, about the middle of the first semester, I talked with Mr. Jones about some of his problems," will not fulfill the administrator's professional or legal responsibilities at a hearing to discharge a teacher. Carefully prepared and dated records of each conference, as well as recorded observations of the teacher's work, will enable the administrator to be much more certain of his statements and to substantiate any charges he may make. Many of the reasons for discharge are subtle and difficult to demonstrate or even articulate, but it is necessary to document them as accurately as possible. A school administrator should never attempt to discharge a teacher on a mere pretext which is not the moving cause for the non-retention, when the real reason is constitutionally impermissible. If the real reason is a violation of the teacher's basic constitutional rights, and the reason advanced is a sham, the school administrator can be personally liable for damages.¹⁹

The role of the administrator in the dismissal of a teacher is crucial. It is usually his responsibility to prepare and file the charges with the board of education for their consideration and to present definite and irrefutable evidence at the hearing to substantiate the charges. He is under the highest professional obligation to present honest, complete, and accurate evidence. There can be no doubt that a teacher's professional reputation is damaged by nonrenewal or dismissal, and it may well bring an end to his professional career.

Reasonable and Just Cause Defined

Definitions of reasonable and just cause have depended primarily on arbitration awards for analysis and the courts have applied similar standards.²⁰ Just cause includes any cause which bears a reasonable relation to the teacher's fitness or capacity to discharge the duties of the position which is not arbitrary, irrational, unreasonable, or irrelevant to the board's responsibility of building up and maintaining an efficient school system. It is crucial that the school board make a determination of the adverse effect of the conduct on the "fitness to teach." The

¹⁹ 42 U.S.C. § 1983 (1970).

²⁰ Weisberger, Recent Developments in Job Security: Layoffs and Discipline in the Public Sector, 41, Institute of Public Employment, Cornell University, (1976).

Michigan Court of Appeals, in considering the "fitness" of tenure teachers, adopted²¹ the rationale and guidelines of the California Supreme Court decision in Morrison v. State Board of Education.²²

*In determining whether the teacher's conduct thus indicates unfitness to teach the board may consider such matters as the likelihood that the conduct may have adversely affected students or fellow teachers, the degree of such adversity anticipated, the proximity or remoteness in time of the conduct, the type of teaching certificate held by the party involved, the extenuating or aggravating circumstances, if any, surrounding the conduct, the praiseworthiness or blameworthiness of the motives resulting in the conduct, the likelihood of the recurrence of the questioned conduct, and the extent to which disciplinary action may inflict an adverse impact or chilling effect on the constitutional rights of the teacher involved or other teachers. These factors are relevant to the extent that they assist the board in determining whether the teacher's fitness to teach, i.e., in determining whether the teacher's overall impact on his students are likely to meet the board's standards.*²³

In Beebee, the Michigan Court of Appeals interpreted reasonable and just cause as used in the Tenure Act to require evidence of adverse effect on the teacher's students and, secondarily, on other teachers and staff members. The court stated:

²¹ Beebee v. Haslett Bd. of Educ., 66 Mich. App. 718, 239 N.W.2d 724 (1976).

²² 1 Cal.3d 214, 461 P.2d 375, 82 Cal. Reprtr. 175 (1969).

²³ Beebee v. Haslett Pub. Sch., 66 Mich. App., 718, 725-726, 239 N.W.2d, 724 728 (1976). It should be noted that this case was reversed 406 Mich. 224, 278 N.W.2d 37 (1979). The Supreme Court upheld the Findings of the State Tenure Commission issued by the Commission pursuant to the Supreme Court's order of remand, 401 Mich 954 (1977). The Commissions "Findings" on remand followed the Court of Appeals rationale in Beebee, concluding that incompetence was established by a showing by the controlling board that ineffective classroom control endangering student safety adversely affected the students in Beebee's classroom. In Cameron v. Bd. of Educ. of the Algonac Community Schools, TTC 77-25, at p. 5, footnote, the Commission stated, "We believe. . . that the Court of Appeal's rationale and the factors set out for determining the issue of incompetency are still applicable. Further, these factors as discussed in Niami, *supra*, are looked to in the majority of jurisdictions when determining the issue of incompetence. We do not find that our reliance on these and other factors is a contradiction of the Supreme Court's decision in Beebee."

'[J]ust and reasonable cause' can be shown only by significant evidence proving that a teacher is unfit to teach. Because the essential function of a teacher is the imparting of knowledge and of learning ability, the focus of this evidence must be the effect of the questioned activity on the teacher's students. Secondly, the tenure revocation proceedings must determine how the teacher's activity affects other teachers and school staff.²⁴

The court added:

We note further that school boards and the Tenure Commission should, in each case, make specific determinations concerning the challenged teacher's knowledge of his subject, his ability to impart it, the manner and efficacy of his discipline over his students, his rapport with parents and other teachers, and his physical and mental ability to withstand the strain of teaching. In each case, the effect on the school and its students of the acts alleged to require dismissal must be delineated.²⁵

The phrase "teacher's students" includes all students in the school where the teacher is employed. With respect to "other teachers and school staff," the effect on all those teachers and staff employed in the school district should be considered.²⁶

The application of the Beebe requirement that an adverse effect on students and teachers must be shown is illustrated in a case where the teacher was charged with insubordination.

[T]he evidence indicates, and the school board found, that, among other things, plaintiff had failed to comply with administrative regulations regarding the use of his classroom during the lunch hour, that contrary to board policy and administrative rule, he left his classroom unsupervised during times that classes were normally scheduled, that contrary to board policy and the master agreement, plaintiff often failed to turn in lesson plans as required, that contrary to an administrative directive, he permitted students to use a storage room, that he failed to follow procedures prescribed by board policy for dismissing students from class and that plaintiff had, on many occasions

²⁴Id. at 724, 239 N.W.2d at 728.

²⁵Id. at 726, 239 N.W.2d at 729 (emphasis added). The underlined portion of this quote cites the five factors of incompetence. The Commission held that it is not necessary that all five factors be established to support a charge of incompetence. Any one, or a combination are sufficient. *Niemi v. Bd. of Educ., Kearsley Sch. Dist.*, TTC 74-36.

²⁶*Sutherby v. Gobles Bd. of Educ.*, 73 Mich. App. 506, 252 N.W.2d 503 (1977).

failed to schedule course-related activities for his classes and permitted students to engage in non-course-related activities during class time.

The evidence also showed that the questioned activities affected the other students and teachers in the school.²⁷

The principles set forth in Beebee and Sutherby must be applied by the Tenure Commission in reviewing substantive questions. These principles were cited by the circuit court in reversing a pre-Beebee Tenure Commission.²⁸ The Tenure Commission recently cited the same five principles as those defining "incompetency."²⁹ The Commission noted that incompetency is a term without exact definition and added:

Our review of the law discloses that the charge of incompetence is the result of a finding by school officials of a pervasive pattern of behavior resulting in a lack of classroom organization and dissatisfaction on the part of the pupils and supervising authorities. . . . In the majority of cases this Commission reviewed, a number of charges regarding various aspects of the teacher's performance were combined to establish the charge of incompetence and held to justify the teacher's discharge. Incompetence we find is a multifaceted charge incorporating a number of factors in varying degrees.³⁰

The Commission held that a teacher must be given an opportunity to correct the alleged deficiencies before the charge of incompetency will be upheld.³¹

The Michigan Supreme Court broadened the definition of "reasonable and just cause" by holding that a dismissal is justified if "there is substantial evidence that the teacher's classroom is significantly more disorderly or unsafe than would be reasonably expected."³² The Tenure

²⁷Id. at pp. 511-12, 252 N.W.2d at p. 506.

²⁸Chester v. Coldwater Community Sch., No. 75-224 Circuit Court, Branch County (November 2, 1977).

²⁹Tenure Commission answer to order of superintending control of TTC 74-36. Niemi v. Kearsley Community Sch. Dist., No. 77-19973-AA, Circuit Court, Ingham County (September 25, 1979).

³⁰Id. at 4, (emphasis added).

³¹Id.

³²Beebee v. Haslett Public Schools (after remand), 406 Mich. 224, 233, 278 N.W.2d 37 (1979).

Commission has held that factors other than those set forth in Beebee could establish a charge of incompetence.³³

In Beebee, the Supreme Court clarified the issue of whether or not Mrs. Beebee had been discharged because of a disagreement over teaching philosophy. Despite the Commission's pronouncement that "The philosophy of the learning center approach to teaching, the method used by Mrs. Beebee, was not in contention by the administration or board members. . .," the Court of Appeals said that the Commission majority held in effect that "where a school board disagrees with the teaching philosophy of a tenured teacher, it may dismiss that teacher even where his or her students' achievement level is equal to that of their peers." This characterization of the Commission's decision by the Court of Appeals was held to be incorrect. The Supreme Court held that validity of Mrs. Beebee's teaching philosophy was not in dispute. The issue, said the Supreme Court, was Mrs. Beebee's "failure to implement her philosophy in a safe and orderly fashion." Thus, the issue of academic freedom, i.e., whether or not a teacher has a right to implement his own teaching philosophy despite board objection, was never decided in Beebee.³⁴

Insubordination

Charges of insubordination have been reviewed on several occasions. In Davis v. Grand Rapids Board of Education³⁵ the Commission defined insubordination as "willful disobedience to a directive or policy by one fully understanding such directive or policy." In Tolliver v. Carrollton Board of Education³⁶ The Commission stated: "[f]or finding of insubordination the rule or directive must be reasonable and not arbitrarily applied." In Sutherby v. Gobles Board of Education, the court stated: "[t]he questioned activities and the record concern a consistent pattern of violation of rules and regulations that clearly are within the powers of the school board and the administration. . . . Such a pattern of violations showing persistent insubordination to proper authority, can be presumed to have an adverse effect on the students, teachers and staff of a school."³⁷

³³Cameron v. Bd. of Educ. Algonac Community Sch., TTC 77-25. The Commission held that the length of service in the district does not require that a different standard be applied in a discharge case. Id. at 6.

³⁴Beebee v. Haslett Public Schools, 406 Mich. 224, 278 N.W.2d 37 (1979).

³⁵TTC 76-26.

³⁶TTC 76-37 at 8 (teacher was held to be insubordinate for not issuing hall passes to students from his classes despite the fact that the rule was contained in the teachers' handbook, and failure to prepare daily lesson plans when requested to prepare plans or goals and objectives by his supervisor).

The Michigan Supreme Court has held that where a teacher has been made aware of a problem and refused to cooperate, such refusal is detrimental to the proper functioning of the administration of the school.³⁸

The Tenure Commission has held on several occasions that excessive absenteeism without medical excuse is insubordination and sufficient reason for discharge.³⁹ The Court of Appeals has upheld charges of excessive absenteeism and tardiness, failure to prepare and provide daily lesson plans,⁴⁰ and falsifying sign-in times.⁴¹

Refusal to Pay Agency Shop Fee

The Tenure Commission has been asked to rule on the question of whether a board of education, pursuant to a collective bargaining agreement "agency shop service clause, may discharge a teacher under the definition of reasonable and just cause."⁴² An example of such a clause might be:

In the event that a teacher shall not pay the agency shop service fee directly to the Association or authorize payment through payroll deductions, the Board shall, when notified by the Association, cause the termination of employment of such teacher at the close of the semester.

The Commission deadlocked on a two-two vote on the first two cases⁴³ and affirmed dismissal on the third case.⁴⁴ The latter case was appealed to circuit court which reversed, holding that an agency shop service fee provision had never been authorized by the legislature.⁴⁵

³⁸ *Beebee v. Haslett Pub. Schs.* (after remand) 406 Mich. 224, 234, 278 N.W.2d 37, 41, (1979).

³⁹ *Cohen v. Oak Park Sch. Dist.*, TTC 76-40; *Hamilton v. Fitzgerald Sch. Dist.* TTC 75-36; *London v. Oak Park Sch. Dist.*, TTC 66-5.

⁴⁰ *Wetsman v. Fraser Pub. Sch. Dist.*, 62 Mich. App. 104, 233 N.W.2d 500 (1975); *Caddell v. Ecorse Bd. of Educ.*, 17 Mich. App. 632, 170 N.W.2d 277 (1969).

⁴¹ *Caddell v. Ecorse Bd. of Educ.*, 17 Mich. App. 632, 170 N.W.2d 277 (1969).

⁴² *Applegate v. Grand Blanc Community Schools*, TTC 69-8; *Jackson v. Swartz Creek Community Schools*, TTC 75-12; *Viera v. Saginaw Bd. of Educ.*, TTC 68-14; *Hargraves v. Saginaw Bd. of Educ.*, TTC 68-15.

⁴³ *Viera v. Saginaw Bd. of Educ.*, TTC 68-14; *Hargraves v. Saginaw Bd. of Educ.*, TTC 68-15.

⁴⁴ *Applegate v. Grand Blanc Community Schs.*, TTC 69-8.

⁴⁵ *Applegate v. Teacher Tenure Commission*, Docket No. 114-74-C, Ingham County (Dec. 24, 1971).

This reversal was affirmed by the Michigan Supreme Court.⁴⁶ As a consequence of the Applegate case, the Michigan Legislature amended the Public Employees' Relations Act (PERA)⁴⁷ to allow for inclusion of an agency shop service fee in negotiated master agreements between boards of education and teachers' unions. Later, the constitutionality of an agency shop service fee was sustained by the U.S. Supreme Court.⁴⁸ Subsequent to the PERA amendment and the Supreme Court decision, the Tenure Commission was again requested to rule on the agency shop service fee--reasonable and just cause question.⁴⁹ The Commission held that refusal of a teacher to pay the fee had no connection with the teacher's job performance. The Commission stated:

The charges in the instant case had no relation to the Appellant's teaching abilities and/or her conduct in, or out of, the classroom and the resulting effects on her students or the school system. No evidence was presented to this Commission regarding the harmful effect such a failure to pay union fees or dues would have either on the students of Appellant or on the school system.⁵⁰

The Commission also stated:

While not disputing the constitutionality of the 'agency shop,' this Commission rules that 'reasonable and just cause' for dismissal was not supported in this case against the Appellant. At no time throughout the appeal has the Appellant's moral conduct or ability to teach been questioned. Moreover, she has not been charged with insubordination nor has it been contested that students did not learn. The Commission determines that nonpayment of 'agency shop' fees or dues does not meet the standards of reasonable and just cause for discharge within the meaning of the Tenure Act.⁵¹

In 1978, the Commission held that a tenured teacher was entitled to the procedural protections of the Tenure Act when a controlling board seeks to discharge such teacher for violation of an agency shop

⁴⁶ Applegate v. Teacher Tenure Commission, 389 Mich. 775, ___ N.W.2d ___ (1979)

⁴⁷ MCLA 423.210(1)(2), MSA 17.455(10)(1)(C)(2).

⁴⁸ Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977).

⁴⁹ Jackson v. Swartz Creek Community Schools, TTC 75-12.

⁵⁰ Id. at 4.

⁵¹ Id. at 6 (emphasis added). It is apparent that the Commission majority was attempting to adhere to the guidelines set forth in Beebe that the teacher's activity must have a negative impact on students and staff.

fee provision in a collective bargaining agreement. The board had terminated the teacher and admitted that it had not followed the Tenure Act. The Commission never reached the agency shop service fee-reasonable and just cause question, holding only that the procedures of the Tenure Act must be adhered to in discharging a tenured teacher for failure to pay an agency shop service fee.⁵² As a result, the Commission's holding in Jackson is the tentative law.⁵³

MAKING FORMAL CHARGES

A tenured teacher may be dismissed only after written charges have been filed with the controlling board of education and the teacher. It is mandatory that the charges against the teacher be in writing, signed by the person making the charges (usually the teacher's principal, supervisor, or superintendent) and filed with the secretary or other designated officer of the controlling board.⁵⁴ The board has the sole authority to decide whether to proceed upon the charges.⁵⁵ The controlling board should conduct an independent review of the charges and enter its decision whether to proceed in the board minutes.⁵⁶

⁵²Parks v. Bd. of Educ of Detroit, TTC 78-7.

⁵³Because of the uncertainty as to how the agency shop service fee-reasonable and just cause question will be resolved, it is recommended that school boards negotiate a save-harmless clause in their master agreements with teachers or incorporate a provision that the teacher will continue to work pending final adjudication of the issue. It does not seem wise for a school board to expose its district to potential liability under present law.

⁵⁴MCLA 38.102, MSA 15.2002. Lawson v. Wayne Community Sch. Dist., 63 Mich. App. 57, 233 N.W.2d 713 (1975).

⁵⁵Biberstine v. Port Austin Sch. Dist. No. 9, 51 Mich. App. 274, 214 N.W.2d 729 (1974).

⁵⁶Failure to make an independent review of the charges and decision to proceed on the charges may not be a fatal error if the teacher actually had full due process. In Simon v. Gibraltar School District, 52 Mich. App. 643, 217 N.W.2d 891 (1974), the teacher claimed a denial of due process because the local board of education conducted the hearing without having made a prior independent review of the charges and decision to proceed on the basis of the charge. The Court of Appeals rejected the teacher's claim on the basis that both the "notice" and "hearing" were provided and the existence of an independent review and decision might be inferred. The court found that not even the least vestige of prejudice could be claimed from the procedure and termed the teacher's claim "closely akin to indulgence in idle ceremony." Id. at 647, 217 N.W.2d at 893.

If the board decides to proceed, the teacher must be furnished with a written statement of the charges, including a statement of the teacher's rights.⁵⁷ The charges provided to the teacher must include the signature of the individual who has made the charges.⁵⁸ The purpose of the written charges is to provide the teacher with a clear basis for the preparation of a defense.⁵⁹ On appeal, the Tenure Commission will review the charges to determine whether this purpose has been met.⁶⁰

The written charges should be as specific as possible for it is difficult to defend oneself against general charges. General and conclusory allegations are insufficient to provide the notice intended by the statutory provision.⁶¹ The following statements were held to be conclusory charges and insufficient:

- "1. The health, safety and welfare of the students in your classroom is in jeopardy.
- "2. The deficiencies in the total instruction program for your second grade class that have been pointed out to you.
- "3. A demonstrated lack of cooperation with the principal and others on a number of occasions and agreements as to future action in the classroom have been ignored by you."⁶²

Charges deemed by the Tenure commission to be sufficiently specific were given in Chambers v. Roseville Board of Education:

- "a. Mr. Chambers had failed to maintain a satisfactory degree of order in the classroom so that learning could take place.

⁵⁷ MCLA 38.102; MSA 15.2002. Providing the teacher with a copy of the Tenure Act fulfills the school district's legal obligation to provide a statement of the teacher's rights.

⁵⁸ Lawson v. Wayne Community Sch. Dist., 63 Mich. App. 57, 233 N.W.2d 713, (1975). In this case the secretary of the board of education signed the charges, rather than the person making the charges.

⁵⁹ Earhart v. Eaton Intermediate Sch. Dist., TTC 74-22.

⁶⁰ Dennis v. Flint Bd. of Educ., TTC 77-11.

⁶¹ Lawson v. Wayne Community School District, 63 Mich. App. 57, 233 N.W.2d 713 (1975).

⁶² Id. at 59, 233 N.W.2d at 714.

- "b. Mr. Chambers has failed to accept administrative direction and counseling given in an effort to improve the classroom organization.
- "c. Mr. Chambers had failed to control the movement of his students; permitting them to leave the classroom without authorization and in contradiction to established rules.
- "d. Mr. Chambers had made no effort to communicate with the parents of children with whom he was having difficulty except as appointments were made for him by the principal."⁶³

Because a teacher can be dismissed only for cause and after a hearing, the charges cannot be one of dismissal. Even if felony charges have been brought against a teacher in criminal court, procedural and substantial due process rights incorporated in the Tenure Act must be followed.⁶⁴

If a teacher does not understand the charges, he should request a bill of particulars further delineating the specificity and meaning of every charge. The request should be made at the hearing. The request for a bill of particulars should not be a frivolous request. In one case, a teacher made a request for further specificity of the charges, and it was denied by the controlling board on the grounds that the record of the hearing made it conclusively evident that the teacher was well aware of the meaning of the charges. The refusal by the board to furnish a bill of particulars under these circumstances was held not to be a denial of due process.⁶⁵

A controlling board is not authorized to review or weigh evidence at the time it decides to proceed on tenure charges.⁶⁶ When at the same meeting, a school board received charges against a teacher and adopted a resolution that it had determined that sufficient evidence had been presented to support the discharge, the Tenure Commission found that the board's action violated the due process requirements of the Tenure Act and ordered reinstatement of the teacher.⁶⁷

⁶³Chambers v. Roseville Bd. of Educ., TTC 73-69.

⁶⁴Wright v. Port Huron Area Sch., 13 Mich. App. 1, 163 N.W.2d 673 (1968).

⁶⁵Wetsman v. Fraser Sch. Dist., 62 Mich. App. 104, 233 N.W.2d 500 (1975).

⁶⁶Linders v. Portage Pub. Sch., TTC 72-14.

⁶⁷Dimitruck v. Utica Pub. sch., TTC 74-3.

Since a controlling board may determine whether it wishes to proceed on the charges, the board has the authority to determine if it wishes to proceed on all the charges or on only a limited number.⁶⁸

The Act requires that charges regarding the character of professional services be filed with the controlling board sixty days prior to the end of the school year.⁶⁹ If the board decides to proceed on the basis of the charge, then the teacher must be served with the charges. The statute does not set a time limitation for such service, but it must be within a reasonable time after the charges have been filed and prior to a hearing.⁷⁰ The hearing cannot be less than thirty days nor more than forty-five days after the charges are filed.⁷¹

The charges may be amended after having been served provided the teacher is given ample time to prepare to meet the new allegations.

At the same time the statement of charges is furnished to the teacher, a "statement of the teacher's rights" under the Tenure Act must be included.⁷² Since the discharge of a tenured teacher can be accomplished only by strict compliance with procedural safeguards, failure to provide the "statement of rights" is a fatal procedural error.⁷³

⁶⁸Chambers v. Roseville Pub. Sch., TTC 73-69.

⁶⁹MCLA 38.102; MSA 15.2002. The end of the school year in all Michigan districts is June 30. Ajluni v. West Bloomfield Sch. Dist., 397 Mich. 462, 245 N.W.2d 49 (1976). The statute does not require the controlling board to serve the notice on the teacher sixty days prior to the close of the school year. The statute requires that the charges be filed with the board sixty days prior to the close of the school year. It is important to distinguish between the terms "filing of charges" and "serving the charges." The statute places time limits of "filing of charges" but is silent as to time limits on "serving the charges."

⁷⁰Wetsman v. Fraser Sch. Dist., 62 Mich. App. 104, 233 N.W.2d 500 (1975). In this case, service of the charges ten days after the filing of the charges and thirty-one days prior to the hearing was deemed to be reasonable.

⁷¹MCLA 38.102; MSA 15.2002.

⁷²Id.

⁷³Biberstine v. School District of Port Austin, 51 Mich. App. 274, 214 N.W.2d 729, (1974); Jessup v. Bd. of Educ., Sandusky, TTC 77-32.

Providing the statement of rights after the initial hearing will not cure the error.⁷⁴ The appropriate remedy would be for the board of education to cancel the hearing and again send a copy of the charges, affixing a copy of the teacher's rights. In order that school boards may easily comply with this procedural requirement of the Tenure Act, the State Department of Education makes available to all school districts up-to-date copies of the Tenure Act.

The Tenure Act requires that "[c]harges concerning the character of professional services shall be filed at least 60 days before the close of the school year."⁷⁵ The term "character of professional service" is not defined in the Tenure Act. The Tenure Commission has interpreted the term "character of professional services" to apply only when competency or professional activities within the classroom are in question.⁷⁶ A review of its decision indicates the Commission will apply this rather narrow definition to "character of professional services." The Commission held that the use of excessive physical force which violated school board policy was insubordination. The incident did not involve classroom disciplines or "character of professional services."⁷⁷ The violation of school discipline was held to be outside the term "character of professional services."⁷⁸ A termination based on sale of a school-owned vehicle to a student in violation of school policy, providing the student with a title to another automobile, and inserting a different identification number on the school-owned vehicle did not fall under the term "character of professional service."⁷⁹

It is reasonable to assume that charges against teachers concerning matters other than character of professional services can be filed at any other time.

As with notice to probationary teachers, the school district has the burden of proof that the written charges were actually delivered to the teacher. The written charges should be hand delivered or given through

⁷⁴ *Fucinari v. Dearborn Bd. of Educ.*, 32 Mich. App. 108, 188 N.W.2d 229 (1971).

⁷⁵ MCLA 38.102; MSA 15.2002.

⁷⁶ *Cristan v. West Iron County Sch. Dist.*, TTC 73-63; *Carlk v. Grosse Pointe Pub. Sch.*, TTC 70-22; *Zarend v. Oscoda Area Sch.*, TTC 67-13.

⁷⁷ *Tschirhart v. Pontiac Sch. Dist.*, TTC 73-72.

⁷⁸ *Jessup v. Sandusky Bd. of Educ.*, TTC 77-32.

⁷⁹ *Cristan v. West Iron County Sch. Dist.*, TTC 73-62.

mail addressed to the teacher's home address and a return receipt received by the board. Notice of the charges by "word of mouth" would not constitute legal notice. Even if the teacher attended the board meeting at which the decision was made to send the teacher the written charges, his attendance would not constitute legal notice. The actual notice, when given, must be written.

If a teacher is handed a copy of the written charges, he cannot refuse it and later claim that no notice was given.

SCHOOL BOARD HEARING

After charges and a statement of the teacher's rights have been served on a teacher, he has the option of requesting a hearing.⁸⁰ If the teacher requests a hearing, the board must grant it. If the hearing is denied, the teacher may appeal to the Tenure Commission. But a hearing is not automatic; it follows as the request of the teacher and the request must be definite. If a teacher receives a copy of the written charges and does not request a hearing, the board may decide on dismissal or demotion without injustice to the teacher.

The hearing, if requested, must take place not less than thirty nor more than forty-five days after the filing of charges.⁸¹

Public or Private?

The Tenure Act specifies how the hearing shall be conducted. The hearing shall be public or private at the option of the teacher.⁸² If the teacher decides to have a public hearing, it must be held in a room adequate to accommodate the teacher's friends.⁸³ Once a teacher elects a private hearing the question arises as to whether the decision is part of the hearing. It has been held that in cases in which the teacher has requested a private hearing, the board's decision may not be disclosed publicly until the teacher has exhausted the appellate process.⁸⁴ In Royal Oak School District v. Schulman⁸⁵ the issue was

⁸⁰ MCLA 38.101.105, MSA 15.2001.2005.

⁸¹ MCLA 38.102, MSA 15.2002.

⁸² MCLA 38.104(a), MSA 15.2004(a).

⁸³ Rehberg v. Board of Educ. of Melvindale, Ecorse Township Sch. Dist. No. 11, 345 Mich. 731, 77 N.W.2d 131 (1956).

⁸⁴ 1959-60, pt. 1, p. 177, OAG No. 3296, September 1, 1959. The Attorney General ruled that if a teacher elects to have a private hearing, it remains private throughout the hearing and decision process until a final decision is reached.

⁸⁵ 68 Mich. App. 589, 243 N.W.2d 673 (1976).

whether a board of education can take official and final action to discharge a teacher at a meeting called without prior notice as was required by the Public Board Meetings Act⁸⁶ where the teacher had previously requested that hearings regarding his discharge be held private. The Court stated:

We hold that where a teacher elects a private hearing the board of education's decision to dismiss or demote may be kept private until the teacher has exhausted the appellate processes.⁸⁷

The Open Meetings Act, MCLA 15.261, MSA 4.1800(11), adopted subsequent to the Schulman decision, specifically allows for "closed" sessions of a school board to conduct a tenure hearing and to make its decision. The Act provides: "A public body may meet in closed session only for the following purposes: (a) To consider the dismissal, suspension, or disciplining of, or to hear complaints or charges brought against, a public officer, employee, staff member, or individual agent, when the same person requests a closing hearing"⁸⁸

The Attorney General has ruled that it is unnecessary for a controlling board to terminate a teacher at a public meeting to satisfy the notice requirements of the Open Meetings act. The statute permitting a board of education to render a private decision must be given precedence over a general statute requiring such boards to officially act at public meetings.⁸⁹

School Board Members Impartiality in Hearing Tenure Case

The competency of a school board to impartially conduct a teacher tenure case has been challenged in the courts.⁹⁰ In rejecting the impartiality claim, the Court of Appeals stated:

⁸⁶ MCLA 15.251; MSA 4.1800(1) repealed in 1976 and replaced by Open Meetings Act, MCLA 15.261, MSA 4.1800(11). The pertinent new section being MCLA 15.265, MSA

⁸⁷ 68 Mich. App. 589, 593, 243 N.W.2d 673 (1976).

⁸⁸ MCLA 15.268(8)(b), MSA 4.1800(18)(b) effective March 31, 1977.

⁸⁹ ___, ___ OAG, No. 5138, March 8, 1977.

⁹⁰ Rogers v. Trenton Bd. of Educ., 61 Mich. App. 682, 233 N.W.2d 141 (1975).

The charge that the attorney presenting the cause, the personnel director, the supervisor, and the school principal were allies of the school board such that they were all eager for the same outcome and disposition is unsupported. The board was not an opponent having an interest completely opposite of the plaintiff's. The controlling school board represents the public interest in securing an educational system for its students. These aforementioned witnesses were providing testimony challenging the plaintiff's continued employment status while unable to discharge her duties. The board does not have an interest in sustaining either 'side' beyond protecting the student body. A school board is not so intimately involved in the employment status of its teachers as to be partial.⁹¹

Burden of Proof and Evidence

The school district is required to produce evidence at tenure hearings and the burden of proving unfitness rests with the controlling board. The school district must show reasonable and just cause for demoting or discharging the teacher. The evidence presented at the hearing must be confined to the charges in the notice or to amended charges properly filed and served. Evidence regarding matters not included in the notice cannot be presented. A teacher cannot be dismissed or demoted on allegations not included in the original or amended notice.

Witnesses

The controlling board has the power to subpoena witnesses on its own motion or at the request of the teacher. If a witness refuses to appear, the controlling board may petition the circuit court in the county requesting the court to issue its subpoena to appear before the board to testify. Failure to obey the court subpoena may result in a contempt citation. The hearing gives the teacher the opportunity to cross-examine the school district's witnesses and produce his own witnesses. The refusal to grant a teacher's request to subpoena a witness

⁹¹ *Id.* at 691-692, 233 N.W.2d at 146 (emphasis added). A partiality claim can be reduced by appointing an attorney mutually acceptable to the teacher and the board of education to preside over and conduct the hearing. While this practice adds to the cost of the hearing it has obvious advantages particularly when the school board president or one of the trustees is not an attorney.

⁹² *Sutherby v. Gobles Bd. of Educ.*, 73 Mich. App. 506, 252 N.W.2d 503 (1977); *Beebee v. Haslett Bd. of Educ.*, 66 Mich. App. 718, 239 N.W.2d 724 (1976); *Luther v. Alpena Bd. of Educ.*, 62 Mich. App. 32, 233 N.W.2d 173 (1975); *Rumph v. Wayne Community Sch. Dist.*, 31 Mich. App. 555, 188 N.W.2d 71 (1971).

constitutes a denial of due process and violates the Teachers' Tenure Act.⁹³ Requests to the controlling board of education for subpoenas to enable a teacher to present his case should be liberally granted.⁹⁴ In Pounder, the school board refused to honor the teacher's request to subpoena a doctor who, at the request and direction of the board, had examined the teacher and submitted a written medical evaluation to the board.⁹⁵ The doctor's report was considered by the board in rendering its decision and his information was crucial to the solution of the case. Introduction of the letter report without an opportunity to cross examine the physician was an error. To cure the error the matter was remanded to the board with directions to subpoena the physician.

Transcript

The Tenure Act requires that the controlling board shall employ a stenographer who shall make a full record of the proceedings of such hearing and who shall, within 10 days after the conclusion thereof, furnish the controlling board and the teacher affected thereby with a copy of the transcript of such record, which shall be certified to be complete and correct.⁹⁶

The exact meaning of the wording in this portion of the Tenure Act has been carefully defined in Davis v. Board of Education of River Rouge.⁹⁷ Without a transcript, a teacher cannot properly prepare an appeal from an adverse decision. A delay in delivering the transcript unfairly penalizes the teacher. The period for serving a copy of the transcript must be within ten days of the conclusion of the hearing, not within ten days of the issuance of the board's decision. The Court reasoned that since the Tenure Act provides that a teacher has thirty days from the date of the school board's decision in which to appeal

⁹³ Pounder v. Harper Woods Bd. of Educ., TTC 74-5.

⁹⁴ Pounder v. Harper Woods Bd. of Educ., 72 Mich. App. 717, 250 N.W.2d 504 (1976).

⁹⁵ Upon the teacher's first request to subpoena the doctor, the board complied. When he failed to appear at the hearing, the board admitted the physician's written evaluation into evidence over the objection of the teacher. The board then refused to honor the teacher's request to require the doctor to appear at the hearing and testify, an action which violated the Tenure Act.

⁹⁶ MCLA 38.104(e); MSA 15.2004(e).

⁹⁷ 73 Mich. App. 358, 251 N.W.2d 585 (1977).

to the Tenure Commission,⁹⁸ if the statute was interpreted so that ten days can elapse following the decision before the transcript need be provided, the thirty-day statutory appeal period could effectively be decreased to twenty days.

The Tenure Act does not indicate what happens when the board delivers the transcript late. The question to be resolved then is whether a tenured teacher who has been discharged following a hearing before a local board of education is entitled to automatic reinstatement when the board fails to furnish the teacher with a copy of the hearing transcript within ten days of the hearing as required. The Tenure Commission has held that failure to timely provide the transcript was a fatal error, and it ordered reinstatement.⁹⁹ The Supreme Court¹⁰⁰ held that the proper remedy was not reinstatement, but rather a tolling of the period for an appeal.¹⁰¹ The Court stated: "We do not believe the Legislature intended to provide for automatic reinstatement of a teacher who may be unfit and who has not been prejudiced by the delay in furnishing a transcript."¹⁰²

Board members who were absent from part or all of the hearing are required to read the transcript before rendering a decision on the charges.¹⁰³ Board members who were present at the entire hearing are not required to review the transcript before the decision is made; however, this review may be advisable.

Decision

The Tenure Act requires that a written decision must be rendered within fifteen days after the termination of the hearing before the controlling board. Thereafter, the board has five days to furnish the affected teacher with a copy of the decision.¹⁰⁴

⁹⁸ MCLA 38.121; MSA 15.2021.

⁹⁹ *Davis v. River Rouge Bd. of Educ.*, TTC 74-1; *aff'd* 73 Mich. App. 358, 251 N.W.2d 585 (1977); *rev'd* 406 Mich. 486, 280 N.W.2d 453 (1979).

¹⁰⁰ As used in this context, the word "toll" means to suspend or interrupt the running of a statute of limitations.

¹⁰¹ *Davis v. River Rouge Bd. of Educ.*, 406 Mich. 486, 280 N.W.2d 453 (1979).

¹⁰² *Id.* at 490, 280 N.W.2d at 454.

¹⁰³ *Jessup v. Sandusky Bd. of Educ.*, TTC 77-32.

¹⁰⁴ MCLA 38.104(f), MSA 15.2004(f).

It has been determined that a local board of education need not state reasons for its decision, findings of fact, or conclusions of law.¹⁰⁵ It must consider and render a decision on each charge. It is not necessary to find that every charge has been sustained in order to approve a demotion or discharge.

The teacher has thirty days from the date of the school board's decision to appeal to the Tenure Commission.¹⁰⁶ The thirty day appeal period runs from the date of the decision, not the date on which the copy of the decision was furnished to the affected teacher.¹⁰⁷

DEMOTION

Definition and Application

The Tenure Act defines the word demote to mean "to reduce compensation or to transfer to a position carrying a lower salary."¹⁰⁸ The Michigan Supreme Court has strictly construed "demotion" to be of a monetary rather than of a prestigious character.¹⁰⁹ The demotion of a tenured teacher may be accomplished by following the same procedures as required for discharge.¹¹⁰

Compared to the number of cases involving discharge reaching the Tenure Commission for adjudication, there have been few demotion cases. During the 1968-75 period, fifty-nine discharge cases were appealed to the Commission as compared to only nineteen demotion cases. Most claims of demotion are peripheral allegations in discharge cases. Of the nineteen demotion cases, eight were brought by administrators claiming their removal as administrators and assignment to classroom teacher status constituted a demotion.¹¹¹ A careful review of teacher demotion cases indicates that school boards seldom use a demotion penalty option.

¹⁰⁵ *Jessup v. Sandusky Bd. of Educ.*, TTC 77-32.

¹⁰⁶ MCLA 38.121, MSA 15.2021.

¹⁰⁷ *Morrow v. Monroe Pub. Sch.*, TTC 79-5; *Tremonti v. Warren Woods Pub. Sch.*, TTC 71-31; 1959-60, pt. 1, p. 111, OAG No. 3372, June 9, 1959.

¹⁰⁸ MCLA 38.74, MSA 15.1974.

¹⁰⁹ *Dodge v. Board of Educ.*, Saginaw, 384 Mich 346, 183 N.W.2d 793 (1971); *Street v. Ferndale Bd. of Educ.*, 361 Mich 82, 104 N.W.2d 748, (1961).

¹¹⁰ MCLA 38.101, MSA 15.2001.

¹¹¹ *Tenure Notebook*, Michigan Association of School Administrators (Rev. ed. 1977).

It is not difficult to understand why school boards decide to discharge a teacher rather than to demote.

It would not be reasonable for a school board to conduct a long and costly hearing in order to mete out a demotion penalty of several days or weeks suspension without pay. Unfortunately, the Tenure Act does not allow the parties to adopt low-cost, streamlined procedures when demotion, rather than discharge, would be an appropriate remedy. One school board attempted to demote a teacher without following the procedures specified in the Act and was unsuccessful.¹¹² Consequently school boards are likely to tolerate conduct that might be subject to correction by a demotion penalty.

The stringent procedural requirements of the Tenure Act make it difficult for school boards and their administrators to employ progressive discipline, a concept generally accepted in most areas of employment. A progressive (or corrective) discipline program requires the withholding of the final penalty (discharge) until the employee has demonstrated a lack of response to a less severe penalty. A demotion penalty is an effective tool in a progressive discipline program but is not likely to be used widely for tenured teachers in Michigan unless the Tenure Act is changed. It appears that the only penalty that can be efficiently used by school boards at present is the withholding of salary schedule increments, provided the matter has been negotiated with the teacher's union and made part of the district's master agreement.¹¹³

Despite the cumbersome and expensive procedures necessary to implement progressive discipline under the Tenure Act, there is some evidence that the use of demotion as a penalty may increase. For example, in *Fry v. Romeo Board of Education*¹¹⁴ a teacher was suspended without pay after receiving verbal and written warnings for "excessive tardiness." When this corrective discipline failed to change the conduct, the teacher was discharged and the Tenure Commission upheld the discharge. In *Rizzio v. Anchor Bay Board of Education*,¹¹⁵ the Board imposed a two-year suspension without pay and no advancement on the salary schedule for writing "love notes" to a thirteen-year old student. The dissenting commissioners, while describing the incident as "a tasteless, silly prank, which displayed poor judgment on his (the teacher's) part," would have imposed a lesser penalty.

¹¹²*Smith v. Ecorse Pub. Sch.*, TTC 72-24. The school board suspended a teacher for seven days without pay based on charges made by the teacher's principal. No hearing was held. The Tenure Commission held that suspension without pay constitutes a demotion thus entitling the teacher to the remedies provided for in MCLA 38.101, MSA 15.2001. The Commission ordered reinstatement and all salary lost.

¹¹³*Niemi v. Kearsley Pub. Sch.*, TTC 73-52; *Cutshall v. Zeeland Pub. Sch.*, TTC 73-42; *Mathews v. School Dist. of Pontiac*, TTC 65-4.

¹¹⁴TTC 77-19.

¹¹⁵TTC 74-46.

Negotiated Salary Step Retention Provisions

The most common type salary schedule adopted by school districts in Michigan provides for a base salary for beginning teachers and yearly increases awarded for experience up to about twelve years. The question has arisen as to whether the refusal of a school board to grant the annual salary increases as a penalty for deficient teaching constitutes a "demotion" under the Tenure Act.

It has been held that where a salary schedule is totally silent as to deviations, the withholding of an increase, as provided for in the adopted schedule, constitutes a reduction in normal compensation and is a demotion.¹¹⁶ However, the Commission has adopted a policy that a salary retention provision is enforceable if there has been prior approval by the controlling board.¹¹⁷ In *Cutshall*, the school board and teachers' union had entered into a negotiated agreement which provided in part for "financial retention" or a withholding of an increment for unsatisfactory or deficient performance. When a teacher was retained at the same step on the salary schedule as the previous year while teachers similarly situated were granted increments, he claimed the board's action constituted a demotion under the Tenure Act. The Commission held that the Board had reserved the right in the master agreement to withhold normal salary increments and such action did not constitute a demotion.¹¹⁸ The Commission has followed the same policy subsequently.¹¹⁹

The Commission refused to find that a demotion had occurred when a controlling board placed a teacher at the eight and one-half step of a salary schedule instead of the ninth step after it discovered that the teacher was initially hired mid-year and was incorrectly placed on the first rather than the half step.¹²⁰

¹¹⁶ *Matthews v. School Dist. of Pontiac*, TTC 64-5. The teacher was placed on one year administrative probation and the experience increment was withheld. After completing the probationary year successfully, she was granted a one-step salary increase. She claimed that a one instead of a two step increment constituted a demotion. Since the salary schedule provided for no deviations and no performance review occurred, the board's action constituted a demotion.

¹¹⁷ *Cutshall v. Zeeland Pub. Sch.*, TTC 73-42.

¹¹⁸ *Id*

¹¹⁹ *Niemi v. Kearsley Pub. Sch.*, TTC 73-52

¹²⁰ *Farrimond v. Bd. of Educ. of East Jordan*, TTC 78-3.

Redesigned Salary Schedules

It is a common practice during negotiations to change the structure of teacher's salary schedules. Often this results in larger salary increases for some teachers and smaller amounts for other teachers. The question has been raised as to whether this differential treatment constitutes a demotion for those teachers receiving the smaller increases. It has been held that a demotion did not occur when certain classes of teachers in the district received smaller salary increases than others due to a negotiated, redesigned salary schedule.¹²¹

Withholding Compensation or Fringe Benefits

The question has arisen as to whether the action of a school board in denying compensation or a negotiated fringe benefit constitutes a demotion under the Tenure Act.¹²²

When services are not rendered there is no demotion should compensation be withheld. For example when a teacher called in "sick" and then attended a meeting of the teacher's association on the afternoon of the absence, the teacher's pay was withheld. The Commission held that the denial of pay did not constitute a demotion.¹²³ The Commission stated: "[T]here is no requirement under the Tenure Act that a school district is obligated to pay an employee if service is not rendered."¹²⁴

When a pregnant teacher informed her principal that she was unable to teach pursuant to her physician's instructions and requested use of accumulated sick leave, it was denied. The Commission held that there was no demotion even though there was a reduction in salary because there had been a corresponding reduction in the amount of services rendered.¹²⁵ The Commission stated: "A teacher who earns tenure obtains statutory procedural rights against discharge or demotion. These procedural protections provide no rights to attack benefits granted or denied by a contract."¹²⁶

¹²¹Hanson v. Sch. Dist. of Benton Harbor, TTC 71-42.

¹²²Kuntz v. Owendale-Gagetown Bd. of Educ., TTC 77-24; Stewart v. Pewamo-Westphalia Community Sch., TTC 76-55.

¹²³Stewart v. Pewamo-Westphalia Community Sch., TTC 76-55.

¹²⁴*Id.* The Commission noted that a master agreement could define absences and provide remedial procedures.

¹²⁵*Id.* The Commission reemphasized its policy that it was not the proper forum for interpretation of master agreements as previously stated in LaVanway v. Center Line Pub. Sch., TTC 74-14; Hamilton v. Fitzgerald Bd. of Educ., TTC 75-36.

¹²⁶*Id.* at 4.

Misassignment

A school board was found to have demoted a teacher who had been laid-off when it employed her as a day-to-day substitute for an assignment that was actually of permanent status. The Board's failure to give the teacher full pay for her assignment was held to be a demotion.¹²⁷

Demotion of Administrators

Several cases have come before the Tenure Commission and the courts¹²⁸ in which the issue of discharge/demotion of administrators has been raised. (The subject of tenure for administrators is reviewed in detail in the chapter on "Tenure Rights of Administrators.")

In an early case¹²⁹ the Michigan Supreme Court held that the removal of a principal, who had been denied administrative tenure, to the position of a visiting classroom teacher before expiration of his contract and at no reduction in salary did not constitute a demotion. The administrator argued that his reassignment was a demotion even though he was continued at the same pay, because the position of principal ranks higher professionally than visiting teacher. In rejecting plaintiff's assertion, the Court stated: "It is clear from the definition in the Act that the demotion against which it sought to protect teachers, as such, was of monetary rather than a prestige character."¹³⁰

The Commission held that there was no demotion when there was a reduction in salary for an administrator because of his transfer to an administrative position requiring fewer weeks of service.¹³¹

¹²⁷ *Master v. Hamtramck Bd. of Educ.*, TTC 77-20.

¹²⁸

Bode v. Roseville Sch. Dist., 405 Mich. 517, 275 N.W.2d 472 (1979); *Street v. Ferndale Bd. of Educ.*, 361 Mich. 82, 104 N.W.2d 748 (1961); *Goodwin v. Kalamazoo Sch. Dist.*, 82 Mich. App. 559, 267 N.W.2d 142, (1978); *Gondner v. Fruitport Community Sch.*, TTC 77-4; *Purdy v. Jackson Pub. Sch.*, TTC 75-3; *Goodwin v. Kalamazoo Sch. Dist.*, TTC 74-6 and TTC 75-35; *Kestner v. Oak Park Sch. Dist.*, TTC 73-65; *Bode v. Roseville Sch. Dist.*, TTC 72-45; *Rossmann v. Plymouth Community Sch.*, TTC-72-1; *Algodells v. Ferndale Sch. Dist.*, 70-33; *Walters v. Garden City Bd. of Educ.*, TTC 69-2; *McCullough v. Willow Run Pub. Sch.*, TTC 68-20.

¹²⁹ *Street v. Ferndale Bd. of Educ.*, 361 Mich. 82, 104 N.W.2d 748, (1961).

¹³⁰ *Id.* at 88, 104 N.W.2d at 752.

¹³¹ *Purdy v. Jackson Pub. Sch.*, TTC 75-31.

APPEAL PERIOD

When a tenured teacher has been discharged or demoted by a school board, he has thirty days in which to appeal the board's decision to the Tenure Commission.¹³² However, as previously stated, the action of a school board to discharge or demote a tenured teacher must be in strict compliance with the Teachers' Tenure Act. Where a board of education attempts to discharge or demote a tenured teacher without fully complying with the various provisions of the Act, the thirty day limitation is tolled until such time as the school board makes its decision in accordance with the Act.¹³³ The courts will not permit a school board to unilaterally circumvent the procedural safeguards of the Act by its own wrong doing.

¹³²MCLA 38.121; MSA 15.2021.

¹³³*Elgammal v. Macomb County Intermediate Sch. Dist. Bd. of Educ.*, 83 Mich. App. 444, 268 N.W.2d 681 (1978); *Biberstine v. Port Austin Sch. Dist. No. 9*, 51 Mich. App. 274, 214 N.W.2d 729 (1974).

CHAPTER IV

APPEAL RIGHTS OF TENURED TEACHERS

The Michigan Teachers' Tenure Act provides for appeal of school boards' decisions to the Tenure Commission.¹

Timeliness of Appeal

The appeal of a board of education decision must be made within thirty days from the date of that decision. This short period is an extremely rigorous requirement. Failure to appeal within thirty days forecloses the teacher's right of appeal.² The Tenure Commission will not allow a teacher the right to an appeal if he fails to comply with the thirty-day limit, since the purpose of the limitation is to dispose of an appeal when the evidence is fresh.

The thirty-day statute of limitations for appeals of a school board decision to the Tenure Commission does not begin to run until the procedural requirements of the Tenure Act at the school board level have been followed.³ For example, when a board of education failed to

¹MCLA 38.121, MSA 15.2021. "A teacher who has achieved tenure status may appeal any decision of a controlling board under this act within 30 days from the date of such decision, to a state tenure commission."

²Curry v. Huron Valley Sch., TTC 73-59; Tremont v. Warren Woods Pub. Sch., ttc 71-31; 1959-60, pt. I, p. 111, OAG No. 3372, (June 9, 1959). The Tenure Commission had adopted the following rule: "R.38.143 Initiation of Appeal. Rule 13. An appeal from a decision of a controlling board under the Act shall be initiated within 30 days from the date of receipt of such decision by the appealing party or the attorney of the appealing party by filing a notice of appeal and petition, original and 6 copies, with the commission. . . ." (emphasis added.)

The Commission held that its Rule 38.143 exceeded its statutory authority and rescinded it. The appeal date begins to run from the date of the decision. Morrow v. Monroe Pub. Sch., TTC 79.5.

³Davis v. River Rouge Bd. of Educ., 406 Mich. 486, 280 N.W.2d 453 (1979). Biberstine v. Port Austin Public Sch. Dist., No. 9, 51 Mich. App. 274, 214 N.W.2d 729 (1974) accord, Shippey v. Madison Sch. Dist., 55 Mich. App. 663, 223 N.W.2d 116 (1974).

present charges against a teacher and send a statement of his rights as required by the Act, the Court stated:

We hold. . . that where, as here, a board of education attempts to discharge a tenure teacher without fully complying with the provisions of the teachers' tenure act, the 30-day limitation in which the teacher has to appeal to the State Tenure Commission is tolled until such time as the school board makes its decision in accordance with the teachers' tenure act.⁴

Thus, a teacher's failure to appeal to the Commission within thirty days of the school board's decision will not bar a hearing before the Tenure Commission if the board's procedures were not in accordance with the provisions of the Tenure Act. Failure of the board to offer the teacher the procedural safeguards of the Tenure Act tolls the thirty-day time limit for appeals to the Tenure Commission.

In concluding that the statute of limitations was tolled unless a teacher is given proper notification of his rights, the Court in Biberstine was concerned that teachers will not have knowledge of the very limited thirty-day appeal period. The court stated that "[i]n light of the board's failure to notify the plaintiff of his rights under the teachers' tenure act, it is not unlikely that plaintiff was unaware of his right to appeal to the State Tenure Commission."⁵

It has been held that the thirty-day limitation does not bar a petition when a teacher alleges that his termination as a necessary reduction in personnel is a "mere pretext" for what is in fact a discharge unless the teacher has been provided with a statement of rights. The thirty-day statute of limitations for appeals to the Tenure Commission is tolled until the controlling board has provided the laid-off teacher with a statement of his rights under the Tenure Act.⁶ However, notice, charges, and a school board hearing need not be given when a teacher's position is being eliminated.⁷

Despite the fact that in lay-off situations it is unnecessary to provide notice, charges and hearing, this exception does not invoke the thirty-day appeal limitation until the statement of rights has been

⁴Biberstine v. Port Austin Public Sch. Dist. No. 9, 51 Mich. App. 274, 278-279, 214 N.W.2d 729, 732 (1974). This case is an example of the court denying reinstatement for a procedural error.

⁵Id.

⁶Goodwin v. Kalamazoo Bd. of Educ., 82 Mich. App. 559, 267 N.W.2d 142 (1978).

⁷Steeby v. School Dist. of Highland Park, 56 Mich. App. 395, 224 N.W.2d 97 (1974).

provided. The Appeals Court stated that [t]o allow a board to discharge on the pretext of economic necessity, not inform the teacher of appeal rights and then hold the teacher to the 30-day limit would allow the board to profit from its own wrong doing."⁸

In Goodwin, the school board argued that it would never know when a teacher will allege a discharge is a subterfuge, and a teacher may challenge a termination months or years after it occurs. The Court agreed, but recommended that if a local board wishes to forestall any appeals after the thirty-day period, the board should always notify a teacher of the right to appeal a termination, whether for cause or economic necessity.⁹

Procedures for Appeal

The Tenure Commission is directed by statute to provide for rules and regulations for its own internal administration. "The tenure commission shall draw up rules and regulations and shall have the power to amend same and to provide for the conduct of its affairs in such manner as shall be consistent with the provisions of this act."¹⁰

Pursuant to this, the Commission has promulgated its Rules of Practice and Procedure numbered R 38.131 et seq. (See Appendix).

A question arose as to the effect of the Administrative Procedure Act¹² on the Commission's Rules of Practice and Procedure. In Henderson v. Memphis Community School District,¹³ the Court of Appeals ruled that the Administrative Procedures Act is applicable only when a particular agency has failed to provide rules and regulations for its conduct. The Commission had ordered reinstatement of a teacher and compensation for salary lost because the controlling board had failed to file its answer with the Commission within the time required.¹⁴ The Court of

⁸ Goodwin v. Kalamazoo Bd. of Educ., 82 Mich. App. 559, 572, 267 N.W.2d 142, 148 (1978).

⁹ Goodwin v. Kalamazoo Bd. of Educ., 82 Mich. App. 559, 267 N.W.2d 142 (1978).

¹⁰ MCLA 38.140, MSA 15.2040.

¹¹ The current rules recind and replace former rules R 38.71 and R.101 to R.123. A complete copy of the rules is in Appendix.

¹² MCLA 24.201 et seq., MSA 3.560(10) et seq.

¹³ 57 Mich. App. 770, 226 N.W.2d 725 (1975).

¹⁴ Henderson v. Memphis Community Sch. Dist., TTC 71-17. The Rule in question was R38.105 which stated in part that "appellee shall have 15 days within which to file an answer." Rule 38.105 was rescinded and replaced by R38.147 which allows for 20 days instead of 15.

Appeals held that the legislature had intended to authorize agencies to "promulgate rules, not inconsistent with this act or other applicable statutes, prescribing procedures for contested cases"¹⁵ and that the Administrative Procedures Act did not rescind the Commission's Rules of Practice and Procedures since the Administrative Procedures Act provides: "Rules which became effective before July 1, 1970 continue in effect until amended or rescinded."¹⁶ The court held that statutory provisions stated above speak prospectively. "We read them as requiring administrative agencies not to hereinafter promulgate inconsistent or contradictory rules."¹⁷

It was the legislature's intent that where a particular agency fails to provide in its rules and regulations for any type response or answer to a complaint filed with an agency, the Administrative Procedure Act would be applicable. The Court of Appeals held that the Memphis school district was obliged to follow the Commission's rule and stated: "If the commission felt that a formal response was required for it to properly perform its responsibilities, we are not normally disposed to lightly set aside an agency finding in view of the great weight which courts accord to the construction given a statute by the involved agency."¹⁸

The Court of Appeals, however, while conceding that the Commission's rule was mandatory, found that the rule provided no penalty for failure to file or gave no broader or more summary power to the Commission in the event of such failure. The extreme interpretation given to its own rule by the Commission was rejected by the court since fundamental fairness would require that the nonanswering party be apprised of the consequences of the failure to file an answer. The Henderson Court opined "that the question of the teacher's right to reinstatement and back pay should be decided on the merits of the case, not on the narrow ground of the late filing of an answer by the school district."¹⁹

Application of Tenure Commission's Rules and Regulations

The Court of Appeals ruling in Henderson provides a fundamental guideline for application of the Commission's Rules of Practice and

¹⁵ MCLA 24.233 (3), MSA 3.560(133)(3), cited in Henderson v. Memphis Sch. Dist., 57 Mich. App., 770, 776, 226 N.W.2d, 725, 728.

¹⁶ MCLA 24.231(1), MSA 3.560(131)(1).

¹⁷ Henderson v. Memphis Sch. Dist., 57 Mich. App., 770, 775, 226 N.W.2d 725, 728.

¹⁸ Id at 777, 226 N.W.2d at 729 (citations omitted).

¹⁹ Id at 778, 226 N.W.2d at 729.

Procedure. It is likely that the courts will hold that the Commission's rules are "directory" rather than "mandatory." In Henderson, the court indicated rather strongly that the teacher's case should be heard on its merits rather than denying an appeal because of a procedural error. The Commission had interpreted and applied its rule²⁰ that a copy of the transcript of the hearing before the controlling board of education must be supplied to the Commission.²¹ When a teacher failed to furnish the Commission with a transcript, the school board moved for summary judgment arguing that the appeal be dismissed. The Commission held that failure on the part of a teacher to timely file a copy of the transcript of the hearing taken before the board of education is a fatal error not subject to correction.²² On appeal, the Commission's decision was reversed by a circuit court which held that the rule to furnish a transcript was directory and not mandatory.²³

The implication that can be drawn from the Henderson and Berry decisions is that the Commission's rules are directory and that the courts will allow "defects to be cured."²⁴ These decisions are in accord with the major thrust of the Teachers' Tenure Act, which is to protect teachers.

Conditions Precedent to Hearing

Unusual as it may seem, a hearing before the local board of education is not a condition precedent to a hearing before the Tenure Commission.²⁵ There is no provision in the Tenure Act that requires a

²⁰ Rule 38.105 (a) rescinded and replaced by R38.142 which now reads: "A single copy of exhibits and transcript shall be filed unless the commission requests additional copies."

²¹ Berry v. West Branch-Rose City Schools, TTC 73-43.

²² Id.

²³ Berry v. West Branch-Rose City Schools, No. 16012C, Circuit Court, Ingham County (October 23, 1974).

²⁴ The courts' policy of interpreting the Commission's rules as directory rather than mandatory does not follow when interpreting the requirements of the Tenure Act. For example, the failure of a teacher to file an appeal within thirty days of a school board decision, MCLA 38.121, MSA 15.2021, is a fatal error. See Halliburton v. City of Detroit Sch. Dist., TTC 79-1.

²⁵ Elgammal v. Macomb County Intermediate Sch. Dist. Bd. of Educ., 83 Mich 444, 268 N.W.2d 679 (1978).

board hearing as a prerequisite to a Tenure Commission hearing.²⁶ The Commission will, however, review each appeal to determine whether the local board followed all the procedural requirements of the Tenure Act and will remand the matter to the local board where procedural deficiencies exist.

Commission Limitations

The Tenure Commission has ruled that it will not hear issues which involve the interpretation and application of a collective bargaining contract.²⁷ It held that "it is not the proper forum for the determination of issues of a contract law. . . as to whether the request for a physician's 'statement of fitness' is lawful under the collective bargaining agreement."²⁸

The Commission has held that the determination of contractually created seniority rights is beyond the scope of authority of the Commission.²⁹

Third-Party Intervention and Amicus Curiae Briefs

The Attorney General has ruled that the Tenure Commission has the authority to grant intervention by a third party in a case before the Commission. A third (interested) party is someone who will be directly affected by the decision in the proceeding in question. Persons who do not meet the standards for intervention may be allowed to file amicus curiae briefs.³⁰

Disqualification of Commissioners

The Attorney General was requested to answer the following question: "Would the membership of any of the State Tenure Commissioners in the same state and national educational association as the party seeking to intervene, serve to disqualify such commissioners from participating in the decision of the commission."

²⁶Id. at 452, 268 N.W.2d at 683.

²⁷Kuntz v. Owendale-Gagetown Sch., TTC 77-24; Hamilton v. Fitzgerald Bd. of Educ., TTC 75-36; LaVanway v. Center Line Pub. Sch. Dist., TTC 74-14.

²⁸Hamilton v. Fitzgerald Bd. of Educ., TTC 75-36.

²⁹Bebeau v. Van Dyke Pub. Sch., TTC 78-37.

³⁰1976, p. 478, OAG 4978 (May 28, 1976).

It was ruled that any party may file an affidavit of personal bias or disqualification of any Tenure Commission member, and it then becomes a matter of determination by the Commission. A Commission member in question may voluntarily disqualify himself or herself.³¹

Timeliness of Hearing Before Commission

The Tenure Act provides that when a tenured teacher appeals a decision of a local controlling board "[T]he state tenure commission shall provide for a hearing to be held within 60 days from the date of appeal."³²

The question has arisen as to whether the word "shall" as used in the statute is mandatory to the extent that failure to hold the hearing within the prescribed time limit violates a teacher's statutory or constitutional rights.

For several reasons, the Commission has not been able to comply with the sixty-day statutory requirement.³³ This has been the subject of opinions from the Attorney General,³⁴ a circuit court,³⁵ and the Tenure Commission.³⁶ The thrust of these opinions is to protect teachers' rights. Failure of the Tenure Commission to hold a timely hearing will not deprive a teacher of his right to a hearing.

It has been argued that if the Tenure Commission fails to hold a hearing "within sixty days of the date of appeal," the Commission loses jurisdiction. The Attorney General held that a teacher may not be deprived of a hearing because of a delayed hearing date. The Attorney General stated:

It is our opinion that 'shall' used in the last sentence of Section 38.131, C.L. 1948, is mandatory to the extent that it is the duty of the Tenure Commission to provide for a hearing but that time of the hearing is directory, and that

³¹ Id.

³² MCLA 38.121, MSA 15.2021.

³³ It was not unusual for a hearing before the Commission to be held one year or more after appeal. The use of hearing officers will reduce the waiting period.

³⁴ 1949-50, p. 256, OAG No. 987 (June 20, 1949).

³⁵ Michigan Educ. Ass'n. v. State Tenure Comm'n, No. 77-20383-AW, Circuit Court, Ingham County (January 10, 1979).

³⁶ Woodworth v. Lowell Area Sch., TTC 74-3.

having acquired jurisdiction in the appeal due to the timely action of the appellant, the commission did not lose jurisdiction thereafter because of a delayed hearing date. To hold otherwise might result in the abrogation of an appellant teacher's statutory right of appeal which is an integral part of the tenure system of employment.³⁷

The Tenure Commission has adopted the Attorney General's opinion as its own³⁸ and cited three circuit court opinions³⁹ supporting its decision.⁴⁰

In *Michigan Education Association*, the circuit court held that it was the legislature's intent that the time limit be strictly adhered to in order to protect teachers' rights. The court ruled that the Commission must comply with the sixty-day time limit.⁴¹

The circuit court held, however, that before it would issue an order directing the Tenure Commission to hear a case within the sixty-day limit, there must have been a prior written demand upon the Commission for such a hearing and no compliance with that demand.⁴² The

³⁷ 1949-50, p. 256, OAG 987 (June 20, 1949). The Attorney General did not answer the question of whether a teacher is entitled to a hearing within sixty days. He held that a teacher cannot be deprived of a right to a hearing because of a delayed hearing date.

³⁸ *Woolworth v. Lowell Area Sch.*, TTC 74-3 (school board requested dismissal of the teacher's appeal because of a delayed hearing).

³⁹ *Sutherby & Gobles*, No. 74-009-481-AA, Circuit Court, Van Buren County (April 2, 1975); *Pounder v. Harper Woods*, (No. 74-038-083-AA) Circuit Court, Wayne County (September 10, 1975); *Cristan v. West Iron County*, (No. 74-17112-AA) Circuit Court, Ingham County (May 21, 1976); cited as authority in *Woolworth v. Lowell Area Sch.*, TTC 74-3.

⁴⁰ *Michigan Educ. Ass'n v. State Tenure Comm'n.* (No. 77-2038-AW) Circuit Court, Ingham County (January 10, 1979).

⁴¹ The court directed that "an order consistent with this opinion may enter." *Id.* at 10. The Tenure Commission argued that it was unable to hold hearings within sixty days because of insufficient funds and staff, but the court did not find the reason to be meritorious.

⁴² *Id.* The circuit court was well aware of the inability of the Commission to meet the sixty-day time limit for hearings. It acknowledged it had no authority to require the state to spend money to comply with the legislature's intent. No order has yet been issued by the court directing compliance. The decision has been useful to the Commission in obtaining additional resources.

State Department of Education and the Tenure Commission have adopted procedures and added personnel to enable the Commission to comply with the sixty-day requirement of the statute.⁴³

TENURE COMMISSION HEARINGS

The purpose of the establishment of a Tenure Commission to which an aggrieved teacher may appeal is to speed up decisions and foster economy, since court actions are prolonged and sometimes expensive.

The Commission hears appeals from local school board decisions filed by tenure teachers and issues decisions dealing with certain employment issues.

There is an advantage to placing the responsibility for decisions concerning professional controversies in the hands of persons trained in educational matters rather than lawyers. The procedure of a Tenure Commission hearing is usually simplified, with technical rules of judicial process relaxed or ignored.

Composition of the Commission

The Teacher Tenure Commission consists of five members: two are tenured classroom instructors,⁴⁴ one is a member of a local board of education, one must be neither a member of a board of education nor a teacher, and one is a superintendent of schools. One member serves as chairman and one as secretary. The Superintendent of Public Instruction is ex-officio secretary of the Commission. Not more than one member of the Tenure Commission may be appointed from any one school district. Commission members are appointed by the governor for five-year terms. They are paid on a per diem basis while hearing a case⁴⁵ and are

⁴³The Commission appointed one hearing officer in 1978 and another in 1979. The processing of the backlog of cases is proceeding, and the Commission staff is hopeful that the sixty-day limit can be met during 1979 or 1980, and all cases will then be current. Interview with Faith Bishop, Director of the Office of Tenure, Negotiations and Retirement in Lansing, (May 24, 1979).

⁴⁴A person who serves as a full-time counselor to students but does not perform any direct classroom instruction in any subject area cannot serve as a classroom instructor member of the Tenure Commission, 1965-66, p. 148, OAG 4399 (October 12, 1965).

⁴⁵Members of the Tenure Commission are paid on the basis of calendar days while hearing cases. The phrase "while hearing cases" may include reading transcripts and visitation of premises, 1961-62, p. 267, OAG No. 3614 (February 7, 1962).

reimbursed for necessary expenses.⁴⁶ The per diem compensation of the Commissioners and the schedule for reimbursement of expenses is established annually by the legislature.⁴⁷ Commission members may not be paid expenses for attending local school board and teacher association meetings to explain the rules and regulations applicable to the Tenure Act.

Administration of the Commission

The Commission determines its own rules and regulations for the conduct of its affairs. The Commission must meet at least twice each year in Lansing at such times as they determine and other times and places as deemed appropriate by the Commission.⁴⁸

The Tenure Commission was transferred to the Michigan Department of Education in 1956, retaining all its independent powers, duties, and functions granted under the Tenure Act. The budget, procurement, and related management functions of the Commission are supervised by the Michigan Department of Education.

The Office of Attorney General assigns an assistant to act as legal advisor to the Commission.⁴⁹ The State Department of Education provides staff assistance to the Commission through the Department's Office of Tenure, Negotiations and Retirement.

All records of the Commission are kept in the office of the Superintendent of Public Instruction. The records are public information, including the written decisions, as required by the Freedom of Information Act.⁵⁰

Tenure Commission Hearing Examiner

Because of the number of cases coming before it on appeal, the Tenure Commission instituted the practice of using a "hearing officer" to conduct and to be the presiding officer at hearings in cases appealed

⁴⁶ 1963-64, p. 52, OAG No. 4114 (March 22, 1963)

⁴⁷ MCLA 38.138, MSA 15.2038.

⁴⁸ MCLA 38.136, MSA 15.2036.

⁴⁹ MCLA 38.131, MSA 15.2031.

⁵⁰ MCLA 38.139, MSA 15.2039.

to the Commission.⁵¹ The hearing officer cannot decide cases since that is an exclusive matter of the Commission. The appropriate use of a hearing officer has been described by the Attorney General:⁵²

It must be observed, however, that an administrative rule of the State Tenure Commission currently provides that a hearing for the purpose of taking evidence upon a petition shall be conducted by the Commission. Michigan Administrative Code 1954, AACCS, No. 30, R 38.172, p. 10. This administrative rule would therefore have to be changed if the State Tenure Commission is to designate and authorize a hearing officer to conduct evidentiary hearings. It should also be noted that a hearing officer may not decide a contested tenure case.⁵³

Public or Private Hearings

Generally, all authorized business of public bodies shall be open to the public.⁵⁴ The Teachers' Tenure Act describes the procedure which a board of education must follow to conduct hearings on the demotion or discharge of a tenure teacher. "The hearing shall be public or private at the option of the teacher affected."⁵⁵

However, the Tenure Act is silent on the question of whether the hearing before the Tenure Commission is to be public or private at the option of the teacher affected. The Act requires that all business of the Commission must be in compliance with the Open Meetings Act.⁵⁶

The Teachers' Tenure Act provides:

The business which the commission may perform shall be conducted in compliance with Act No. 267 of the Public Acts of 1976, being sections 15.261 to 15.272 of the Michigan Compiled Laws [the Open Meeting Act]. Public notice of the time, date, and place

⁵¹Emergency Rule 42 R 38.172 of the General Rules of the State Tenure Commission, November 21, 1977.

⁵²_____, p. ____ OAG No. 5053 (May 5, 1977).

⁵³Id.

⁵⁴Open Meetings Act MCLA 15.261-275, MSA 4.1800(11)-.1800(25).

⁵⁵MCLA 38.104(a), MSA 15.2004(a).

⁵⁶MCLA 38.136(2), MSA 15.2036(2).

of the meeting shall be given in the manner required by Act No. 267 of the Public Acts of 1976.⁵⁷

However, the Open Meetings Act provides that the Teacher Tenure Commission is not required to open its meetings "when deliberating the merits of the case."⁵⁸

These statutes indicate that the hearing before the local board may be public or private at the option of the teacher and when the Tenure Commission is deliberating the merits of a case.⁵⁹ The Teachers' Tenure Act and the Open Meeting Act are silent as to whether a local board of education must deliberate the merits of a tenure case in private and keep its decision private if the teacher elects a private hearing. The statutes are equally silent as to the rights of a teacher to a closed hearing and private decision at the Commission level and subsequent appellate levels. These matters have been addressed by the Attorney General and the courts.

The Attorney General has ruled that if a teacher elects to have a private hearing before the local board of education, it remains private throughout the hearing and decision process until a final decision is reached.⁶⁰ The Court of Appeals held "that where a teacher elects a private hearing the board of education's decision to dismiss or demote may be kept private until the teacher has exhausted the appellate processes."⁶¹

These rulings indicate rather clearly that if a teacher elects to have a private hearing at the school board level, appeals to the Commission and the courts are also private. The privacy aspect applies to the hearing, the deliberation process, and the decision at all levels. The only exception is that the final decision may be released after exhaustion of all appeals.

Testimony Required

There is no requirement that the Commission "hear" testimony. All that is required is that the Commissioners' determination be independent of the local board. The Commission can make a decision by reviewing the school board hearing transcript. If evidence is heard by the Tenure Commission, the Commissioners are not limited by that testimony in reaching their decision. Testimony taken at the school board

⁵⁷ MCLA 38.136 (2), MSA 15.20136 (2).

⁵⁸ MCLA 15.263 (3) (b) (c), MSA 4.1800 (13) (b) (c).

⁵⁹ 1959-60, Pt. 1, p. 177, OAG No. 3296 (September 1, 1959)

⁶⁰ Id.

⁶¹ Royal Oak Sch. Dist. v. Schulman, 68 Mich. App. 589, 593, 243 N.W.2d 673, 675 (1976).

hearing may also be considered. As a practical matter, the Commission requests that testimony it hears be in addition to the transcript of the school board hearing.

Since the introduction of hearings officers, the Commission no longer hears cases. It reviews the transcript taken before the board of education and the transcript taken before the hearings officer and makes its decision, based on those transcripts.

Costs

The cost of a hearing before the Tenure Commission may not be assessed against the parties involved.⁶²

Role of the Tenure Commission

The right of appeal to the Tenure Commission establishes a safeguard against the arbitrary and unreasonable dismissal of teachers. In general, the scope of review of the Commission is limited to actions of local school boards against a teacher with tenure status.

Under unique circumstances the Commission may take original jurisdiction on appeal of a teacher. In Oswald v. Port Austin Public Schools,⁶³ a case involving the discharge of a superintendent, the local board members were the charging party, and they admitted that the superintendent's due process rights to a fair and impartial hearing would be violated should they conduct a hearing. Because of the unique circumstances that existed between the board and its superintendent, the Commission took original jurisdiction.

The role of the Commission is twofold. First, it must review and consider the record made by the controlling board and may take additional testimony as may be required. After hearing new testimony, if any, together with testimony presented to the school board, the Commission must make a *de novo* decision on all questions of fact and law and enter an order accordingly.⁶⁴

⁶²1955-56, Pt. 2, p. 7, OAG No. 2406 (January 13, 1956).

⁶³TTC 75-17, aff'd no. 76-19130, Circuit Court, Ingham County (1977).

⁶⁴Long v. Bd. of Educ., 350 Mich. 324, 86 N.W.2d 275 (1957); Rohberg v. Bd. of Educ. of Melvindale, Ecorse Township Sch. Dist. No. 11, 345 Mich. 731, 77 N.W.2d 131 (1956).

In a *de novo* hearing the school district must prove to the Commission, just as they must prove to the school board, that there is reasonable and just cause for the demotion or dismissal of the teacher. The school district must present its evidence first. The teacher bears no burden of proof in a *de novo* hearing. It is not incumbent upon the teacher to prove that the school board's decision was arbitrary and unreasonable.⁶⁵

The Commission cannot simply "rubber stamp" the local board's decision. The Commission must determine whether the evidence in the record presented before the controlling board and the testimony taken before the Commissioners establishes by material, competent, and substantial evidence the charges filed.⁶⁶

The Commission's record and decision must contain evidentiary findings of fact and conclusions of law. Proof received by the Commission must be included in the record and support the findings on which the Commission based its decision.⁶⁷ The Commission must articulate with clarity and precision its findings and the reasons for them.⁶⁸ The Commission must indicate the path it took through the conflicting evidence, indicate the testimony adopted, the standard followed and the reasoning it used in reaching its conclusions.

⁶⁵ *Luther v. Alpena Bd. of Educ.*, 62 Mich. 32, 233 N.W.2d 173 (1975) (places the burden of proof on the controlling board); *Comstock Pub. Sch. v. Wildfong*, ___ Mich. App. ___, ___ N.W.2d ___ (1979).

⁶⁶ *Id.*

⁶⁷ *Id.* In *Comstock*, four commissioners reviewed the evidence. Two supported the board and two found for the teacher. The fifth commissioner, while declining to join in the reasoning of the two commissioners voting for reinstatement, filed an opinion in which he concurred in their result. Without expressly reviewing the evidence presented to the school board, he nevertheless supported dismissal. The Court of Appeals remanded the case back to the Tenure Commission for supplementation and clarification of his opinion. He was directed to "state his reasons for choosing between the two 'reasonably differing views' which are supported by the record." at p. 5 slip opinion.

⁶⁸ Under the Administrative Procedures Act, final decisions of agencies must contain findings of fact and conclusions of law. MCLA 24.285, MSA 3.560 (185). If such findings are not in the record, a court, on appeal, is required to reverse MCLA 24.306, MSA 3.560 (206). The Administrative Procedures Act applies to Tenure Commission proceedings; *Henderson v. Memphis Community Sch. Dist.*, 57 Mich. App. 770, 226 N.W.2d 725 (1975).

Evaluation of Tenure Commissioner's Decisions

It is beyond the scope of this study to make an analysis of the Commission's work, but some observations are appropriate.

Most importantly, anyone who undertakes to evaluate the decisions of Tenure Commission decisions must keep in mind the makeup of the Commission's membership and its fundamental purpose. As mentioned previously, the membership is constituted of two teachers, a superintendent, a local school board member and a person not a teacher or board member. The legislature intended that the Commission's major function would be to undertake a *de novo* review of the substantive issues (merits) of appealed cases. The Legislature contemplated that the members would apply their collective expertise to the substantive issues and substitute their judgment for that of the local board of education in teacher discharge and demotion cases. At least a majority of the Commission is professional educators and it should be expected that their judgment on the substantive issues would be the dominant feature of their decisions.

However, many of the questions presented to the Commission call for legal interpretations requiring considerable legal knowledge and research skills. As would be expected when persons not trained or experienced in the law are compelled to make legal interpretations, errors will be commensurate.

Recent decisions of the Commission in which it has addressed the merits of appealed discharge cases are usually well-reasoned opinions, supported by evidence. Sometimes the members disagree among themselves, as would be expected. The discharge of a teacher for cause is a difficult task and reasonable persons will disagree on the interpretation of the evidence. It is the author's opinion that the Commission has functioned as the legislature intended and has performed rather well when deciding questions related to reasonable and just cause for discharge.

In 1970, the Commission erred seriously when it misunderstood its role and rejected its *de novo* reviewing function. The Commission had stated:

It has been the policy of this Commission not to sit in judgment of a local board's rules when these rules are not vague, indefinite, or applied in a discriminatory manner. To hold otherwise would be to substitute the Commission's values on the wisdom of a rule for the views of the board of education which has been elected by the public.⁶⁹

⁶⁹ Nieuwenhuis v. Swartz Creek Bd. of Educ., TTC 70-34.

This posture indicated rather clearly that the Commission was not going to substitute its judgment for the board of education as to the wisdom of a local board rule.

When the Commission followed this policy in a later decision,⁷⁰ the Court of Appeals found that the Commission had not made a de novo review.⁷¹ The Commission had indicated that it gave great deference to the board's decision and required the teacher-appellant to prove that the board's decision was arbitrary and capricious while a de novo review places no burden on the teacher. The Commission's opinion was deficient because it failed to include evidentiary findings.⁷²

Decisions of the Commission since 1971 reflect adherence to its intended purpose of providing a de novo review.

As previously mentioned, the Commission has been given a major responsibility for which it lacks professional expertise. It must rule on many technical legal questions. A review of tenure cases indicates that the Commission is often required to pass on complicated questions of interpretation and application of the Tenure Act. Many of these "legal" questions have later been appealed to the courts, some to the Michigan Supreme Court. Often the judges disagree, and their final decisions include dissenting opinions. It seems to the author to be unfair to the Commission members to criticize their "legal" interpretation of the Tenure Act when considered in light of the composition of the Commission and the difficulty that the courts have had in interpreting the Act. It is the author's opinion that the use of hearings officers, who are attorneys working full time in the area of tenure law, will improve the Commission's work.

Modest criticism of the style, organization, and clarity of the Commission's written decisions is appropriate. Some are excellent, most are fair, and some are quite difficult to interpret.

Recent opinions reveal considerable improvement, probably resulting from appointment of a full-time hearings officers who have the time and training to write the decisions. The Commission has one full time and one temporary hearing officer. The hearing officer presides over hearings, prepares opinion drafts, and assists Commissioners in researching and interpreting legal questions. A review of the Commission's decisions since the hearing officer was assigned indicates considerable improvement in style, clarity, legal interpretation, and consistency. It is also reasonable to assume that as the legal interpretations incorporated in the Commission's opinions improve, the number of appeals

⁷⁰ *Luther v. Alpena Public Sch.*, TTC 71-25.

⁷¹ *Luther v. Alpena Bd. of Educ.*, 62 Mich. App. 32, 233 N.W.2d 173 (1975).

⁷² *Id.*

will decrease. The Commission staff should have available an additional person who is skilled in legal library reference work, research, and writing. Reference materials in the Commission office have increased, and tenure decisions are being prepared for computer retrieval. The Commission's staff, under the leadership of Faith Bishop, continues to improve its service to the teaching profession in Michigan.

These criticisms and suggestions are intended to be constructive. Given the fact that the Tenure Commission docket is crowded and the workload heavy, the education profession in Michigan has been well served by past and present Commission members and staff. The legislature, State Board of Education, and State Superintendent have recognized the importance of the Commission's work by increasing its budget and assigning additional support personnel.

APPEAL OF TENURE COMMISSION DECISIONS

The Teachers' Tenure Act does not provide a method of reviewing a final decision of the Tenure Commission. It has been held,⁷³ however, that decisions of the Tenure Commission may be appealed to circuit court under the Administrative Procedures Act.⁷⁴ This Act requires that if an appeal is taken from an administrative agency, "proceedings for review shall be instituted by filing a petition in circuit court. . . within 30 days after personal service after the mailing thereof, if notice is given by mail."⁷⁵ The case of Shippey v. Madison Public Schools⁷⁶ illustrates the application of this rule. Shippey had alleged a wrongful termination of her contract but her appeal to the Commission was not timely. She then appealed to circuit court and was denied a hearing because the appeal to the court was also late. The Court of Appeals held that her late filing in circuit court was fatal to her assertion of rights under the Tenure Act. Therefore, timely perfection of an appeal to circuit court is a jurisdictional prerequisite.

It is a fundamental rule that tenured teachers must appeal local school board decisions to the Tenure Commission before a circuit court can assume jurisdiction. Review of a tenured teacher's discharge or other adverse rulings are limited by the rule that an administrative

⁷³ Shippey v. Madison Sch. Dist., 55 Mich. App. 663, 223 N.W.2d 116 (1974); Beebe v. Haslett Pub. Sch., 40 Mich. App. 296, 198 N.W.2d 860 (1972).

⁷⁴ MCLA 24.108; MSA 3.560 (21.8).

⁷⁵ MCLA 24.108(2); MSA 3.560(21.8)(2).

⁷⁶ 55 Mich. App. 663, 223 N.W.2d 116 (1974).

agency's decision is not subject to judicial review until the aggrieved party has exhausted all administrative remedies.⁷⁷ This point of law was illustrated in Elgammal. Elgammal was discharged by the board of education without a hearing. The board claimed it had notified Elgammal of the charges against him and that he had not requested a hearing within forty-five days as required by the Tenure Act. The Tenure Commission agreed with the board, but was reversed by the circuit court on the grounds that Elgammal's delay in receiving his notice was reasonable because of hospitalization. The circuit court directed the local board to conduct a hearing and stated that it would hold in abeyance a decision on Elgammal's request for reinstatement and back pay until after the hearing before the board of education.

The Court of Appeals found that the circuit court was fully within its powers to remand the matter to the local board for a hearing but erred by directing that the results be forwarded directly to the court, thereby bypassing the Tenure Commission. Such an order, the court held, impermissibly expands the appellate jurisdiction of the circuit court at the expense of Elgammal's right to administrative review before the Tenure Commission.⁷⁸

Failure to timely appeal a Tenure Commission decision constitutes a waiver of the teacher's rights under the Tenure Act, but not all rights. In Bruinsma v. Wyoming Public Schools,⁷⁹ the court held that the Tenure Act must be construed to provide tenure and probationary teachers with "contractual safeguards." The argument that the Tenure Act constituted the sole remedy was rejected and the court held that the Tenure Act "does not excuse a school district from honoring a valid contract"⁸⁰ and that the circuit court had jurisdiction to consider a breach of contract claim. The same conclusion was reached in Shippey v. Madison School District.⁸¹

The tenure act does not expressly deprive the circuit courts of jurisdiction to decide common law breach of contract suits. Nor does it limit aggrieved teachers to any particular remedy. Teachers are not required to resort to appeal to the state tenure commission and a request for reinstatement.⁸²

⁷⁷Elgammal v. Macomb County Intermediate Sch. Dist. Bd. of Educ., 83 Mich. App. 444, 268 N.W.2d 679 (1978).

⁷⁸Id. at 450, 268 N.W.2d at 682.

⁷⁹38 Mich. App. 745, 197 N.W.2d 95 (1972).

⁸⁰Id. at 749, 197 N.W.2d at 97.

⁸¹55 Mich. App. 663, 223 N.W.2d 116 (1974).

⁸²Id. at 668, 223 N.W.2d at 119.

Based on the ruling in Bruinsma, it may be stated as a general rule that if a teacher has not filed timely appeals to the Tenure Commission or circuit court, an appeal possibility may exist under teacher contract law.

Courts Standard of Review

The standards of review of Tenure Commission decisions of appellate courts is the same as that applied to decisions and rulings of other state agencies as provided in the state constitution. "[Appellate] review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; and in such cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record."⁸³

When it is alleged that the Tenure Commission decision is not supported by competent, material and substantial evidence, the reviewing court must examine the whole record to determine whether enough evidence exists. This examination must avoid invasion of the Commission's fact-finding responsibility and afford the plaintiff a meaningful review of its decision. The guidelines of the court's reviewing function were set out in Michigan Employment Relations Commission v Detroit Symphony Orchestra Inc.⁸⁴

What the chapters of the Constitution intended was a thorough judicial review of administrative decision, a review which considers the whole record--that is, both sides of the record--not just those portions of the record supporting the findings of the administrative agency. Although such a review does not attain the status of *de novo* review, it necessarily entails a degree of qualitative and quantitative evaluation of evidence considered by an agency.⁸⁵

A *de novo* review by a circuit court is improper where it reviews the Commission's record, makes its own determination concerning the credibility of witnesses, and weighs the evidence and merits of a case.⁸⁶ Appellate courts (circuit, appeals, or supreme) cannot decide

⁸³ Mich. Const. Art. 6, § 28 (1963).

⁸⁴ 393 Mich. 116, 223 N.W.2d 283 (1974).

⁸⁵ *Id.* at 124, 223 N.W.2d at 287.

⁸⁶ *Beebe v. Haslett Pub. Sch.*, 66 Mich. App. 718, 239 N.W.2d 724 (1976); *Freiberg v. Bd. of Educ. of Big Bay de Noc Sch. Dist.*, 61 Mich. App. 404, 232 N.W.2d 718 (1975).

questions of fact, except to determine whether the proof supports the findings.⁸⁷ The appellate court's responsibility is to determine whether the Tenure Commission's decision, findings, rulings, and orders are supported by competent, material, and substantial evidence on the whole record. Their first step is to separate the Tenure Commission's findings of fact from its understanding of the law controlling the matter. In an appealed case from the Tenure Commission, the Michigan Supreme Court stated its role:

We cannot, certiorari or otherwise, review and decide questions of fact brought by appeal to one decided by the commission. Our only function is to determine from the record whether proof received by the controlling board, or the Commission, or both supports findings on which the commission has decided for or against the appealing teacher.⁸⁸

The court has also stated "that the construction placed upon a statute by the agency legislatively chosen to administer it is entitled to great weight."⁸⁹

In *The Courts and the Public Schools*, Newton Edwards has provided an excellent explanation of the meaning of appeal and the role of the court. (The words "Tenure Commission" could be interchanged with "board of education" in the following statement).

When an appeal is taken to the court by an aggrieved teacher, the court will, as a rule, make a determination of three things: (1) Did the board of education have jurisdiction, that is, did it act within its scope of authority? (2) Did the board follow the procedures prescribed by statute? and (3) Did the board have some reasonable basis for its action? The courts will not permit a board to dismiss a teacher for some illegal cause. They will require a board to follow the statutory mode of dismissal, as, for example, the giving of notice and the holding of a hearing. What the court will not do is to reweigh evidence in order to determine its credibleness or where the preponderance lies. It will examine the evidence only to determine whether the board acted reasonably or arbitrarily. And if the evidence

⁸⁷ *Long v. Bd. of Educ. Dist. No. 1 Fractional*, 350 Mich. 324, 86 N.W.2d 275 (1957); *Luther v. Bd. of Educ. of Alpena*, 62 Mich. App. 32, 233 N.W.2d 173 (1975).

⁸⁸ *Long v. Bd. of Educ., Dist. No. 1 Fractional*, 350 Mich. at 326, 86 N.W.2d at 276.

⁸⁹ *Davis v. River Rouge Bd. of Educ.*, 406 Mich. 486, 280 N.W.2d 453 (1979). Despite its pronouncement, the Court disagreed with the Tenure Commission's decision in this matter holding that a delay in furnishing a transcript did not entitle the teacher to automatic reinstatement.

Is such that reasonable men might disagree with respect to the conclusion to be drawn from it, the action of the board will be sustained. The board's findings will be overruled only when it has acted arbitrarily, unreasonably, and without any substantial basis of fact.⁹⁰

Courts cannot inquire into the motives of the board and/or the Tenure Commission and cannot say whether testimony of one witness should be believed rather than that of another. If the Tenure Commission does not abuse its discretion by acting arbitrarily, corruptly, capriciously, or upon insufficient charges, and its findings are based on competent relevant evidence, its acts are final and not subject to review by the courts.

An excellent example of a reversal of a Tenure Commission decision is provided in Freiberg v. Board of Education of Big Bay de Noc School District.⁹¹ The Commission found that Freiberg had been laid off in good faith due to financial difficulties, although it acknowledged that animosity existed between the school board and Freiberg. The Court of Appeals held that the Commission's decision was not supported by substantial evidence on the whole record, reversed the Tenure Commission and ordered Freiberg's reinstatement. The Court spelled out in detail its reasons for the reversal.

In the absence of an appeal, the orders of the Tenure Commission are conclusive and final. The Tenure Commission has no authority to compel compliance with its orders. However, the Commission may enforce its orders through application to a proper court for a writ of mandamus against the board of education.⁹²

JURISDICTION OF FEDERAL COURTS

Federal courts have no authority to interpret the application of the Michigan Teacher's Tenure Act. Review of actions of school authorities under the Tenure Act is the prerogative of the Michigan courts and not of the federal judiciary. Federal jurisdiction may be limited by the eleventh amendment to the United States Constitution⁹³ if the defendant is an agency of the state, such as a school district.

⁹⁰ The Courts and the Public Schools, 504 (1955)

⁹¹ ___ Mich. App. ___, ___ N.W.2d ___ (1979).

⁹² 1959-60, pt. 1, p. 123, OAG No. 3406 (September 29, 1940).

⁹³ U.S. Const. Amend. XI provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State."

A teacher does have a right to appeal decisions of local school boards to the federal courts if the board refuses to rehire him, or terminates him, because he exercised his rights as guaranteed by the free speech clause of the first amendment, the self-incrimination clause of the fifth amendment, the due process clause of the fifth and fourteenth amendments, or by the equal protection clause of the fourteenth amendment. These are constitutionally impermissible reasons for refusal to rehire a teacher or discharge him.

Two Michigan teachers have been unsuccessful in their attempts to have the federal courts rule on their dismissals. In Morse v. Woziak,⁹⁴ the teacher complained that his contract was not renewed "due to his liberal political and social philosophies and his advocacy of same." The federal district proceeded to rule on the application of the Teachers' Tenure Act as a purely state claim, one which is pendent⁹⁵ to a claim arising under 42 U.S.C. § 1983 (1970). However, the federal appeals court⁹⁶ reversed, holding that the teacher had alleged deprivation of federal constitutional rights in an obvious "bootstrap" attempt to obtain federal review of issues which are in the domain of the state courts of Michigan. In this case the court held that the teacher's claims were unsubstantial and federal jurisdiction over the application of the Tenure Act should have been denied. The appeals court held that jurisdiction cannot be conferred on federal courts by the procedural device of filing an unsubstantial action under 42 U.S.C. § 1983 (1970) and relying on the doctrine of pendent jurisdiction.⁹⁷

In Manchester v. Lewis,⁹⁸ a probationary teacher contended he was denied tenure because of his participation in the school visiting speaker program and for his public comments criticizing the school's policy concerning visiting speakers. The claims were found to be unsubstantial and the court declined review of his allegations that his rights under the Teachers' Tenure Act had been violated.

If a teacher has substantial claims that his federal constitutional rights have been violated, the federal court will then hear the claim, and would also have jurisdiction at the same time to construe claims arising under the Michigan Teacher's Tenure Act.⁹⁹

⁹⁴398 F. Supp. 597 (E.D. Mich. 1975).

⁹⁵Original jurisdiction resting under a federal claim extends to any nonfederal claim against the same defendant if the federal claim is substantial and if the federal and nonfederal claim constitute a single cause of action.

⁹⁶Morse v. Woziak, 565 F.2d 959 (6th Cir. 1977).

⁹⁷*Id.*

⁹⁸Manchester v. Lewis, 507 F.2d 289 (6th Cir. 1977).

⁹⁹*Id.*

CHAPTER V

RELATED PERSONNEL MATTERS

While framing the Teachers' Tenure Act, the Michigan legislature recognized the need to provide for the resolution of certain personnel problems related to teacher tenure other than conditions for the acquisition of tenure and for the discharge or demotion of teachers. Therefore, the Act authorizes school boards to grant leaves of absence to tenured teachers, provides tenured teachers with certain rights in lay-off and recall situations, regulates the resignations of teachers (discontinuing service), and permits school boards to adopt certain retirement policies. Extra-pay positions are covered by the Act.

In addition, the Attorney General has construed the effect of school district reorganization on the rights of tenured teachers, and the authority of a school board to transfer and assign tenured teachers within the school district.

These aspects of the Act are discussed in this chapter.

LEAVE OF ABSENCE

Authority

A controlling board has authority under the Tenure Act to grant, upon written request of a teacher, a voluntary leave of absence not to exceed one year, subject to renewal at the discretion of the board and to grant, without request, an involuntary leave of absence because of physical or mental disability for a period not to exceed one year. This authority like all others under the Tenure Act is vested in the local controlling board and cannot be delegated to an administrator.

Placing a teacher on either a requested or unrequested leave of absence relieves the controlling board of any obligation to compensate the teacher during the leave period. However, a school board may adopt a policy, or agree by contract, to pay all or part of a teacher's salary and/or fringe benefits under a sabbatical leave program provided the teacher has taught in the district for seven consecutive years.

¹MCLA 380.1235; MSA 15.41235.

Requested (Voluntary) Leave

It is clear from the Act that a controlling board has the option of authorizing or denying a requested leave of absence. Nothing in the Act grants a teacher a right to have a hearing on a denied request or requires a controlling board to hold a hearing on the denial.

Despite the seeming simplicity of the voluntary leave provisions, several disputes have come before the Tenure Commission for adjudication. One issue is whether a board of education may grant a leave for a period longer than that requested by the teacher. In Nickles v. Brown City Community Schools,² a tenured teacher had requested a six-week leave but instead was granted a leave for six months. When she sought to commence work after approximately six weeks, the teacher was informed that she could not return to her teaching position. She requested a hearing, which was denied. On appeal to the Tenure Commission the teacher argued that the board's refusal to permit her to return to her employment caused her to lose compensation, that the denial constituted a "demotion," and that the refusal to grant a hearing denied her of procedural due process guarantees provided in the Tenure Act. The Commission held that nothing in the Tenure Act prevents a teacher from taking a leave of absence of less than one year, and that the board had no authority to deny the teacher's request to return to her employment. The board's action constituted a demotion which occurred without a hearing. Thus, if a controlling board authorizes a leave of absence exceeding that which is requested, it is improper.

A board must presume that a teacher on leave will return to work upon termination of a voluntary leave unless an extension is requested or notice of discontinuance of service is served on the board.³ When a teacher's requested leave expires, the board of education is required, with certain exceptions explained later, to return the teacher to her position or one that is comparable. This point of law is illustrated in Jones v. Wyandotte School District.⁴ A tenured teacher had been

²TTC 72-27.

³Ross v. Mona Shores Schs., TTC 75-30.

⁴TTC 72-42. A teacher cannot insist that he be returned to a specific position or the very same position he left when starting a leave; 1961-62, p. 264, OAG No. 3609, (Feb. 7, 1962). When a teacher demanded on return from leave of absence that she be placed in a specific position, and it was denied, the Commission held that the board had not violated the teacher's rights by refusing her request and not appointing her to any position. Lyon v. Wyoming Pub. Schs., TTC 77-37.

granted a voluntary leave of absence for the entire school year. She informed the school superintendent in March of the school year during which she was on leave that she would be able to work at the beginning of the next school year according to the agreement. She was not employed, however, until November. In the absence of a decision to continue her leave or take action to discontinue her services, the board violated the teacher's rights under the Tenure Act. The board's action was equivalent to a "demotion," and the teacher was entitled to compensation lost.

In Hambouz v. Brandywine Public Schools,⁵ the question presented was whether a tenured teacher had a right to terminate a voluntary leave of absence prior to its expiration when a position was open for which the teacher was certified and qualified to fill. The Commission held that "where, a tenured teacher. . . has agreed with the controlling board to a voluntary leave of absence, without a claim of subterfuge or bad faith, the failure of a Board to return such teacher prior to expiration of that leave is not a demotion under the Act."⁶ The above policy, however, might not apply to teachers requesting maternity leaves. School boards cannot adopt or approve negotiated mandatory maternity leave periods.⁷ This matter is discussed in a later section.

Another important issue raised in Hambouz was whether the thirty-day statute of limitation applicable to appeals of school board decisions to the Tenure Commission was controlling when an early return from leave was requested by the teacher and denied by the board of education. The Commission held that the thirty-day limitation was tolled in this instance and stated:

We see no undue burden placed upon the controlling Board in requiring that where a teacher seeks to return from a leave of absence prior to its expiration, that the teacher be informed by the Board of its decision on whether or not it shall return the teacher to the classroom. Further, should the teacher be denied the opportunity to return, a written statement of his/her rights under the Act should be included in the Board's decision. Without such notification the thirty-day statute of limitations is tolled.⁸

⁵ TTC 77-46.

⁶ Id. at 5.

⁷ Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 94 S.Ct. 791, 39 L.Ed.2d 52 (1974); Kawin v. Melvindale Bd. of Educ., 65 Mich. App. 472, 237 N.W.2d 514 (1975).

⁸ Hambouz v. Brandywine Pub. Schs., TTC 77-43 at 3 (emphasis added). This decision indicates that a board of education must respond in writing to a request by a teacher who wishes to return early from a voluntary leave. The fact that a teacher may appeal to the Commission, as in Hambouz, does not mean that the teacher is by that right entitled to reinstatement or compensation lost.

Rights of Teachers on Leave During Staff Reduction. Three cases have come before the Tenure Commission requiring the determination of the rights of teachers on a leave of absence when staff reduction occurred.

In Smalley and Lewis v. Flint Board of Education two questions arose. First, was a board of education required to reemploy in mid-term a tenured teacher whose voluntary leave had expired even if no position was available. Second, if a nontenured teacher occupied a position for which the tenured teacher was certified and qualified to fill, was the board required to break the contract with the nontenured teacher in order to create a vacancy mid-year for the teacher on leave to fill. A critical factor in the Smalley case was that during the period she was on voluntary pregnancy leave, the board had reduced the number of teaching positions because of declining enrollments. An arbitrator had ruled that Smalley had no rights to a job under the seniority rules of the master agreement.⁹ The Commission found that the master agreement provided a specific order of assignment for the filling of vacancies that was controlling for teacher Lewis. Accordingly, Lewis had no right to a position until a vacancy existed. The Commission also held that a school board has no obligation to create a vacancy for a tenured teacher seeking to return from a leave of absence in mid-year by breaking a contract and terminating a probationary teacher.¹⁰

⁹ Smalley v. Flint Bd. of Educ., TTC 76-43. The Commission later explained its decision in Smalley in Brown v. Marshall Pub. Schs., TTC 78-33.

In Smalley, the Appellant was not returned to the classroom after a maternity leave. The controlling Board argued the contract controlled. It permitted the Board to place a teacher back into the classroom if a vacancy existed. We found that the teacher in question had been placed on maternity leave pursuant to the contract. The contract required a leave of, at minimum, one full semester. The teacher sought to return prior to the end of that leave period.

This Commission held that once the teacher was certified by a physician's statement that she was able to return, her rights to return, if any, were controlled by the contract. The terms of the contract did not violate the Tenure Act. Nor was the Act violated by the Board's failure to breach its contract with then employed probationary teachers holding positions for which Appellant was certified and qualified. *Id.* at 18. (Emphasis added).

¹⁰ Lewis v. Flint Bd. of Educ., TTC 76-43.

The companion cases of Smalley and Lewis dictate several legal principles. If, after a teacher commences a leave of absence and a staff reduction occurs, a teacher's rights to return upon expiration of the leave and claim a position, as against another tenured teacher, would be subject to the seniority provisions of the district's master agreement. But upon expiration of the leave, the board must take action to place the teacher or layoff.¹¹ A tenured teacher returning from leave of absence would, despite any provisions of a master agreement, be entitled, ahead of any probationary teacher, to a position for which the tenured teacher was certified and qualified to fill. However, a school board is not required to terminate a nontenured teacher in mid-year and break a contract in order to accommodate a tenured teacher returning from leave of absence.

Absent an intervening necessary reduction of personnel affecting tenured teachers, a tenured teacher returning from a leave of absence has a statutory right to be reemployed. A board of education must take appropriate action if a teacher is on leave and a staff reduction has occurred. This is illustrated in Bebeau. Bebeau had requested and received a one-year leave of absence. The board declined to reinstate him at the end of the year because of a lack of vacancies due to teacher layoffs. The teacher was never notified that his leave was being extended or given a statement of his rights. He received no response to a written request for a hearing. The board contended that the teacher was still on leave. This assertion was unacceptable to the Commission. It held that:

If the school district had suffered a necessary reduction in personnel during Appellant's absence, or if Appellant's return from his leave of absence created a surplus of tenured teachers for available positions, Appellee should have made the decision to place Appellant on layoff status. Appellee's failure to do so denied Appellant a substantial right established by the Act--the right to be appointed to the first appropriate vacancy.¹²

The action of the board in Bebeau was held to have created a "subclass" of teachers based on their leave of absence status with respect to their recall rights. This action in effect terminated Bebeau's employment. As such, it was held that Bebeau was discharged without charges, notice, or hearing and without a finding of reasonable and just cause.

Since many teachers are involved in layoffs because of declining enrollments and economic problems, it is important that the rights of teachers on leave and the obligation of school boards to teachers

¹¹ Bebeau v. Van Dyke Pub. Schs., TTC 78-37.

¹² TTC 78-37 at 7.

on leave be summarized. In Bebeau, the Commission stated "[I]f a tenured teacher (on leave of absence) cannot be re-employed because there are no appropriate positions available, the School Board's proper cause of action, under the Teacher's Tenure Act is to place the teacher on lay-off status under the provisions of MCLA 38.105."¹³

Whether seniority or other negotiated factors would require a determination whether to place a teacher returning from leave on lay-off status is an issue the Commission will not decide. The Commission has adopted a firm policy that it will not interpret and apply provisions in negotiated master agreements.

In summary, it can be said that a board of education cannot remain silent when a teacher's leave of absence expires. It must place the teacher on lay-off status pursuant to MCLA 38.105, MSA 15.2005, proceed to terminate the teacher for cause by placing the teacher on suspension and filing charges pursuant to MCLA 38.103, MSA 15.2003, or place the teacher on unrequested leave of absence for physical or mental disability, with the right of the teacher to request a hearing in accordance with MCLA 38.112, MSA 15.2012. Unless one of these three actions is taken, the teacher returning from leave of absence must be placed in a classroom situation comparable to the position left. Lacking this, the teacher is entitled to all salary lost.

Maternity Leaves. Most voluntary leaves are for reason of pregnancy and nearly all of the Tenure Commission voluntary leaves cases concerned maternity leaves. It is essential that teachers and school boards understand the basic legal rights teachers possess when voluntary leaves are for maternity purposes. At issue in a non-tenure case was the question of whether a board of education and a teachers' union can legally enforce a negotiated requirement that a teacher's pregnancy leave must continue for four months after date of birth of the child.¹⁴ The U.S. Supreme Court struck down maternity leave provisions nearly identical to those in question.¹⁵ In Kewin, the Michigan Court of Appeals rejected a school board's argument that since the teacher's bargaining representative had consented to the maternity provisions, the policy was permissible. This highly personal right, which is well rooted in our Constitution, the Court held, cannot be

¹³Id. at 6.

¹⁴Kewin v. Melvindale Bd. of Educ., 65 Mich. App. 472, 237 N.W.2d 514 (1975).

¹⁵Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 94 S.Ct. 791, 39 L.Ed.2d 52 (1974); Kewin v. Melvindale Bd. of Educ., 65 Mich. App. 472, 237 N.W.2d (1975).

bargained away. The board, which relied on the language in the master agreement and refused to allow the teacher to resume her duties, was required to compensate the teacher for wages lost.

Rights of teachers are now additionally protected by the Pregnancy Discrimination Act of 1978 (42 U.S.C. § 2000-e(k)). Discrimination because of pregnancy was prohibited in 1978 when Congress amended Title VII of the Civil Rights Act of 1964. The law prohibits disparate treatment of pregnant women for all employment-related purposes. The measure, P.L. 95-555, which amended Section 701 of Title VII by adding a new subsection (k) does the following: 1) requires employers to treat pregnancy and childbirth the same as other causes of disability under fringe benefit plans; 2) prohibits terminating or refusing to hire or promote a woman solely because she is pregnant; 3) bars mandatory leaves for pregnant women arbitrarily set as a certain time in their pregnancy and not based on their individual inability to work; and 4) protects the reinstatement rights of women on leave for pregnancy-related reasons, including credit for previous service and accrued retirement benefits, and accumulated seniority.

As stated previously in this section, the principle established in LaFleur is that the teacher has the right to decide when she will commence and terminate a maternity leave, subject of course to the standard she is physically capable of carrying out her assigned duties. It is recommended that school boards staff vacant teaching positions created by teachers on maternity leave with substitutes on a day-to-day basis who can be expeditiously terminated in order to accommodate teachers seeking to return from pregnancy leave. If staff reductions occur during the teacher's leave, her right to return at her discretion will be limited by the seniority provisions of the master agreement and vacancies.

Unrequested (Involuntary) Leave

A board of education may grant an involuntary leave of absence, not to exceed one year, to any teacher because of physical or mental disability. The Act provides that "any teacher so placed on leave of absence shall have the right to a hearing on such unrequested leave of absence in accordance with the provisions for a hearing in article 4, section 4 of this act."¹⁶

Hearing Rights Prior to School Board Action. The question has arisen whether it is necessary for a board of education, prior to making the decision to place a teacher on

¹⁶MCLA 38.112, MSA 15.2012.

Involuntary leave, to hold a hearing.¹⁷ The Court of Appeals held "The phrase 'that any teacher so placed on leave of absence shall have the right to a hearing' unequivocally indicates that the involuntary leave precludes the hearing and no pretermination hearing is contemplated."¹⁸ The court also held that there is no federal constitutional right to a hearing prior to making a decision to place a teacher on an unrequested leave.¹⁹

Hearing Procedures When Requested. The purpose of the hearing on an involuntary leave of absence, if requested, is to provide a teacher with the opportunity to challenge arbitrary action and to compel evidence of cause. The controlling board, rather than the administrative staff, was specifically designated by the Tenure Act to adjudicate claims by teachers,²⁰ and the hearing cannot be delegated.

Notice. It has been held that formal notice, beyond the letter stating the cause of the involuntary leave of absence, is unnecessary.²¹ Nor is it necessary for the board to notify the teacher of the involuntary leave of absence sixty days prior to the date the leave commences.²²

¹⁷ *Rogers v. Trenton Bd. of Educ.*, 61 Mich. App. 682, 233 N.W.2d 141 (1975).

¹⁸ *Id.* at 686, 233 N.W.2d at 144. The Tenure Commission has followed the same rule. *Barker v. Dearborn Bd. of Educ.*, TTC 72-4; *Rogers v. Trenton Bd. of Educ.*, TTC 71-2.

¹⁹ 61 Mich. App. at 687-689, 233 N.W.2d at 144-145. In holding that a pretermination type hearing is not constitutionally required, the Court stated: "[d]ue to the school board's obligations to the community and its students, it would be unreasonable to prohibit a board from taking the appropriate actions when necessary to temporarily remove a physically or mentally impaired instructor who cannot adequately discharge the classroom duties." *Id.* at 689, 233 N.W.2d at 145.

²⁰ *Rogers v. Trenton Bd. of Educ.*, 61 Mich. App. 682, 233 N.W.2d 141 (1973).

²¹ *Id.*

²² *Cox v. Ferndale Sch. Dist.*, TTC 72-35.

While the question whether the controlling board has a legal obligation to furnish the teacher with a "statement of rights" under the Tenure Act when placing the teacher on an involuntary leave has not been decided, it is strongly advised. This recommendation is based on a Tenure Commission decision in which it was held that the controlling board should have furnished such a statement when denied a teacher an opportunity for an early return from a voluntary leave of absence.²³

Rights of Returning Teachers. A school board may not retain a nontenured teacher in preference to a tenured teacher returning from a leave of absence in a position which the latter is qualified to fill.²⁴ Failure to return a tenured teacher at the expiration of a leave is a discharge.²⁵

The Tenure Commission has stated that "[t]he Teachers' Tenure Act does not countenance the proposition that a request for a leave of absence is a resignation with the mere hope of future rehiring."²⁶ The controlling board must presume that the teacher will return to work upon the expiration of the leave.²⁷ However, the right to return is not absolute. It is subject to at least three exceptions: (1) when charges have been filed against the teacher and he is suspended from duty; (2) termination of services due to a necessary reduction in personnel; and (3) placement of the teacher on an unrequested leave for physical or mental disability. The latter presumes that a leave of absence can be renewed. Unless one of these actions has been invoked, the teacher returning from a leave of absence must be placed in a classroom position comparable to the one he left.²⁸ If it has been necessary

²³Hambouz v. Brandywine Pub. Sch., TTC 75-30. Furnishing the teacher with a "statement of rights" together with the involuntary leave of absence notice has the potential of invoking the thirty-day limitation on appeal to the Tenure Commission.

²⁴1961-62, p. 264, OAG No. 3609 (Feb. 7, 1962); Brown v. Marshall Pub. Sch., TTC 78-33. Placement may be in a comparable position, not necessarily the one he left. In Brown the school board argued that a teacher on leave did not fall under the definition of "teacher" as set forth in MCLA 38.71; MSA 15.1971. The Commission rejected the board's contention, Id at 10.

²⁵Brown v. Marshall Pub. Sch., TTC 78-33.

²⁶Bebeau v. Van Dyke Pub. Sch., TTC 78-37.

²⁷Ross v. Bd. of Educ. of Mona Shres, TTC 75-30.

²⁸Bebeau v. Van Dyke Pub. Sch., TTC 78-37. Another exception should be added. A teacher does not have the right to return to a specific position, only a comparable one. Lyon v. Wyoming Pub. Sch., TTC 77-37.

for the school board to lay off teachers for reasons of declining enrollments or economics during the time the teacher was on leave, the reappointment of the teacher, whether on unrequested or requested leave, is not automatic. The layoff and recall provisions of the master agreement are controlling in this instance.²⁹ A teacher's right to return is subordinate to the recall rights of all teachers who have been laid off by a necessary reduction in personnel.

When a teacher's leave of absence (voluntary or involuntary) expires and the controlling board does not return the teacher to classroom duty, the board must notify the teacher of this decision in writing. A statement of the teacher's rights should accompany the written notice. The board must supply the teacher with a list of vacancies. Failure to provide the teacher with these items will stay the running of the thirty-day appeal period. If notice and a statement of rights are given, the thirty-day appeal period commences from the date of service of the notice on the teacher. The Commission held that appropriate notice and statement of rights requirements for return from leave of absence situations are safeguards for the teacher to forestall attempts by a board of education to thwart the return of the teacher by a subterfuge.³⁰

The question has been raised whether a board of education must provide a hearing to a teacher who has been denied a placement upon returning from a leave of absence. The Commission held that no statutory right exists to require a hearing before the controlling board but the teacher may appeal to the Tenure Commission under MCLA 38.121, MSA 15.201.³¹

In Brown v. Marshall Public Schools³², the board contended that since it must notify a probationary teacher sixty days before the close of the school year that he is to be terminated (assuming he will be replaced), then the tenured teacher on leave must give sixty days

²⁹Smalley v. Flint Bd. of Educ., TTC 76-8, and Lewis v. Flint Bd. of Educ., TTC 76-43.

³⁰Lyon v. Bd. of Educ. of Wyoming Pub. Sch., TTC 77-37. The Commission held that a teacher returning from a leave of absence must be informed in writing of the board's decision regarding reemployment, supplied with a list of vacancies, and provided with a statement of teachers' rights under the Act.

³¹Id. at 9. The Commission ruled that a tenured teacher on leave of absence is a "teacher" within the scope of the definition included in the Tenure Act "with full right of appeal to the Commission." Id. at 10.

³²TTC 78-33.

notice prior to the close of the school year to the board of his intent to return from leave. The Commission found the argument novel but without merit.³³

LAYOFF AND RECALL

Authority

The Teachers' Tenure Act does not prevent the release of probationary and tenured teachers when there is a lack of need for their services. It because of suspension of schools or services through economic necessity, decreased numbers of pupils, or territorial changes affecting the boundary lines of the district (consolidation, attachment, or annexation), a board of education decides that it will be necessary to reduce the number of teachers, it has full authority to make reasonable reductions.³⁴

In a case cited with approval by the Michigan Court of Appeals,³⁵ the Supreme Court of Oregon held that school authorities have the right to dismiss a teacher when, for some reason not personal to the teacher, his services are no longer necessary, despite the statutory limitations in the Oregon Tenure law upon the power to dismiss.³⁶

The Oregon court stated:

[W]hen such an employee's services must be discontinued because of the demands of economy, or by reason of a lack of pupils, the cause does not have its inception in the teacher, but arises from a source foreign to her and over which she possesses no control. But when her misconduct results in a complaint and subsequently in a dismissal, the cause is personal to herself. Because a ground of removal of the type first above mentioned is one which she could not explain away, statutes of this kind, which regulate the dismissal of teachers and other public employees generally, are interpreted as intending only a regulation of dismissal

³³Id. at 12.

³⁴See Annotation: Right to Dismiss Teacher Because Service Not Needed, 20 ALR 2d 1141 (1965).

³⁵Funston v. Dist. Sch. Bd., 130 Or. 82, 278 P. 1075 (1929), cited in Steeby v. Highland Park Sch. Dist., 56 Mich. App. 395, 397, 224 N.W.2d 97, 98 (1974).

³⁶Steeby v. Highland Park Sch. Dist., 56 Mich. App. 395, 224 N.W.2d 97 (1974).

for causes personal to the employee. An investigation into a situation of the type first mentioned would constitute an inquiry into the policy of the board, and the wisdom of the course it adopted. It is not difficult to perceive that a few decisions by the reviewing tribunal upon matters of policy, adverse to the board, would soon dispossess the latter of its authority and usurp it to the former.³⁷

The Michigan Supreme Court has not ruled on this precise question under the Teachers' Tenure Act, but it has ruled on a similar point regarding release of municipal employees. In Swantush v. City of Detroit,³⁸ the Court stated:

But it is well settled that statutes forbidding municipal officials from removing appointees except for cause are not intended to take away the power given such officials over the administrative and business affairs of the municipality, and do not prevent them from terminating the employment of an appointee by abolishing the office or position which he held, if the action abolishing it be taken in good faith for some legitimate purpose and is not a mere subterfuge to oust him from his position.³⁹

In Slavin v. City of Detroit, the Court stated "[I]n coming to our conclusion, we have not been unmindful of the fact that appointments to the fire department are regulated by civil service provisions in the charter, which however, do not affect dismissals made for reasons of economy."⁴⁰

In Fricke v. City of Grand Rapids, the Court stated:

Authorities universally sustain the proposition that a city can dismiss a civil service employee by abolishing the position which the employee holds. Smith v. Flint City Commission, 258 Mich. 698, and cases cited therein; and that a city may abolish a position for bona fide reasons of economy, Slavin v. City of Detroit, 262 Mich. 173. It is conceded by plaintiffs that if an office or position in the city government is abolished

³⁷ Funston v. Dist. Sch. Bd., 130 Or. 82, at 83, 278 P. 1075, at 1076 (1929).

³⁸ 257 Mich. 389, 241 N.W. 265 (1932).

³⁹ Id. at 396-97, 265 N.W. at 267-268, quoting from State ex rel. Quintin v. Edwards, 40 Mont. 287, 106 P. 695 (1910).

⁴⁰ 262 Mich. 173, 179, 247 N.W. 145, 147 (1933) (citations omitted).

for bona fide reasons of economy, the holder of that position is not entitled to a hearing before the civil service board under the civil service provisions of the city charter.⁴¹

Based on these cases, it is reasonable to assume that a school district has the full authority to reduce its teaching staff, if the reasons are not personal to the teacher and when the true reasons are for the benefit of the district. This right is implied in the language of the Teachers' Tenure Act. "Any teacher on permanent tenure whose services are terminated because of a necessary reduction in personnel shall be appointed to the first vacancy in the school district for which he is certified and qualified."⁴² The statute does not expressly permit school boards to discharge teachers for lack of need for their services. The Court of Appeals held, however, that implicit in the statute is the conclusion that school boards are excused from offering contracts of employment to tenured teachers when it is necessary to reduce personnel.⁴³

Staff Reduction and Individual Contracts

School boards sometimes enter into individual teacher's contracts for the ensuing school year and then, prior to the opening of school, find it necessary to lay off teachers. In Michigan there is no statutory or case law authorizing the termination of teachers' contracts because of lack of funds. In fact, a school district is not justified in dismissing teachers, without compensation, prior to expiration of contracts even though the teachers' services are no longer required. Teachers' contracts have been upheld when schools have burned⁴⁴ and when districts have consolidated.⁴⁵ The Teachers' Tenure Act does not abrogate this case law. When it is necessary for a school district to

⁴¹ 278 Mich. 323, 329, 270 N.W. 697, 700 (1936).

⁴² MCLA 38.105, MSA 15.2005.

⁴³ Boyce v. Royal Oak Bd. of Educ., 76 Mich. App. 526, 257 N.W.2d 153 (1977). (See also 402 Mich 894. Leave to appeal granted on limited issue whether MCLA 38.83, MSA 15.1983 applies to probationary teachers whose services are discontinued for economic reasons); Steeby v. Highland Park Sch. Dist., 56 Mich. App. 395, 224 N.W.2d 97 (1974); Bruinsma v. Wyoming Pub. Sch., 38 Mich. App. 745, 197 N.W.2d 95 (1972).

⁴⁴ Smith v. School Dist. No. 2 of Pleasant Plains, 69 Mich. 589, 37 N.W. 567 (1888).

⁴⁵ Wilson v. Sch. Dist. No. 4, Township of Ellington, 233 Mich. 581, 207 N.W. 810 (1926).

reduce personnel, it is not excused from honoring valid, existing individual contracts.⁴⁶ The contractual rights teachers have which regulate layoff are most likely to be included in the district's master agreement.

It is clear, then, that a board and the teachers' association can provide express language in their master agreement for termination of individual contracts, prior to their expiration, for lack of need of the teachers' services or for economic reasons.⁴⁷

Order of Lay Off

Although the Teachers' Tenure Act allows a school board to lay-off teachers, it does not prescribe a scheme or formula to be followed in determining which teachers are to be laid off first. The Attorney General has ruled that a controlling board may not refuse employment to a tenured teacher while a probationary teacher continues to occupy a position for which the tenured teacher is legally qualified even though the dismissal of a probationary teacher is required if the tenured teacher is to be accommodated.⁴⁸ Therefore, if a reduction is made, and a place remains which a tenured teacher⁴⁹ is "certified and qualified" to fill, that teacher is entitled to that position as against the retention of a first-year probationary teacher.

The Michigan Teachers' Tenure Act does not describe the system for determining which probationary teachers are to be laid off first. Insofar as the application of the Tenure Act is concerned, a local board of education is free to pick and choose from their list of first-year teachers those it wishes to lay off, but is required to treat

⁴⁶Bruinsma v. Wyoming Pub. Schs., 38 Mich. App. 745, 197 N.W.2d 95 (1972).

⁴⁷Boyce v. Board of Educ. of Royal Oak, 76 Mich. App. 526, 257 N.W.2d 153 (1977); (402 Mich. 893, leave to appeal granted on limited issue whether MCLA 38.83, MSA 15.1983 applies to probationary teachers whose services are discontinued for economic reasons).

⁴⁸1961-62, p. 265, OAG No. 3609, February 7, 1962.

⁴⁹For purposes of lay-off, second- and third-year probationary teachers who have not been notified that their services will be terminated for unsatisfactory services must be accorded tenure rights for the limited purpose of recall. Holton Pub. Sch. v. Farmer, 77 Mich. App. 765, 259 N.W.2d 219 (1977).

second-year and third-year probationary teachers as if they have tenure status.⁵⁰

Sixty-Days' Notice Not Required

The sixty-days' notice requirements in MCLA 38.83, MSA 15.1983, which applies to probationary teachers, and MCLA 38.102, MSA 15.2002, which applies to tenured teachers, are not applicable in layoff situations.

The former section of the statute provides that school boards must give probationary teachers sixty-days' notice whether their work has been satisfactory. This requirement does not apply to a situation where probationary teachers are to be laid off for economic reasons. A board of education in lay-off situations is making no judgments about the probationary teacher's competence. The legislature's concern in drafting this section was to inform probationary teachers who were to be terminated for poor performance that their work was not satisfactory. The statute has no bearing where the terminations are prompted by insufficient funds rather than teacher performance.⁵¹

The latter section, which is applicable only to tenured teachers, provides that "charges concerning the character of professional services shall be filed at least 60 days before the close of the school year."⁵² Since lay-off for economic reasons is not related to charges concerning the character of professional services, this section does not apply.⁵³

We may therefore state as a general rule that the Teachers' Tenure Act does not require school boards to comply with the sixty-day notice requirements in the sections discussed above in lay-off situations for either probationary or tenured teachers. Because of uncertainty in interpreting these sections of the Tenure Act, a few

⁵⁰ *Holton Pub. Sch. v. Farmer*, 77 Mich. App. 765, 259 N.W.2d 219 (1977). Where a second or third year probationary teacher is only notified that he will not be rehired, rather than being notified that his work is unsatisfactory, he will be entitled to tenure status.

⁵¹ *Boyce v. Royal Oak Bd. of Educ.*, 76 Mich. App. 526, 257 N.W.2d 153 (1977); (402 Mich. 894, leave to appeal granted on limited issue whether MCLA 38.83; MSA 15.1983 applies to probationary teachers whose services are discontinued for economic reasons).

⁵² MCLA 38.102, MSA 15.2002.

⁵³ *Chester v. Harper Woods Sch. Dist.*, 87 Mich. App. 235, 273 N.W.2d 916 (1978); *Steeby v. Highland Park Sch. Dist.*, 56 Mich. App. 395, 224 N.W.2d 97 (1974).

school boards have adopted the practice of providing sixty-days notice in lay-off situations as a hedge against possible millage election defeats, declining enrollments, and ambiguities in case law. Some school boards, before the school year ends, notify a larger number of teachers than the board actually expects to lay-off at the beginning of the next year. This practice causes low morale among teachers. The indiscriminate use of "pink slipping" has been greatly reduced in the past few years, but nevertheless continues.⁵⁴

Hearing Rights

First-year probationary Teachers. If a staff reduction program includes first-year probationary teachers, they have no statutory tenure rights to a hearing before either the local board of education or the Tenure Commission. First-year probationary teachers have no legal standing under the Tenure Act to question a school board's exercise of judgment in lay-off situations. These teachers may, however, appeal to the circuit court to determine whether the school board acted legally according to common law, statutory interpretation, and constitutional law, or whether the administrative procedure was unreasonable, arbitrary, capricious, or an abuse of discretion. The hearing is not de novo. The role of the circuit court in reviewing terminations of first-year probationary teachers for lack of need of their services is as follows: Since staff reduction involves the exercise of discretion in selection of those to be laid-off, the procedure followed by the school board must be a reasonable one. The fact that a circuit court thinks a school board's decision is unwise is not important. Boards of education, rather than courts, are charged with the important and difficult duty of operating the public schools. Courts have not hesitated to review the good faith of a dismissal of teachers for the stated reason of economic difficulties or declining enrollments but the court's duty, regardless of its personal views, is to uphold the board's decision unless it is clearly arbitrary and unreasonable.

Second and Third-Year Probationary Teachers. A second-year or third-year probationary teacher who is notified that his teaching position has been eliminated and that he therefore will not be rehired for the next school year nonetheless acquires tenure status if the school board failed to provide him with timely written notice that his work was unsatisfactory. Consequently, second-year and third-year probationary teachers will be accorded status vis-a-vis first-year probationary teachers in lay-off and recall situations and will be entitled to invoke the same rights of appeal to the Tenure Commission as is

⁵⁴ School boards have also curtailed the indiscriminate practice of issuing lay-off notices because "pink slipped" employees may be eligible for unemployment benefits during the summer months.

accorded to tenured teachers.⁵⁵ The relevancy of this decision is related to MCLA 38.105, MSA 15.2005, even though these teachers cannot be immediately rehired into a position that no longer exists. It is significant to note that in a situation such as that discussed above, the acquisition of tenure status by the teacher does not automatically entitle the teacher to reinstatement.

Tenured Teachers. Tenured teachers⁵⁶ do not have a statutory right to a hearing before the local board of education if their lay off is for lack of need for their services. The local board is not required to offer or grant tenured teachers a hearing when their contracts will not be renewed for lack of need for their services.⁵⁷ In Steeby, Judge Van Valkenburg stated:

Indeed, there would appear to be no real reason for a hearing where the reason for termination is a reduction in personnel rather than personal charges against a teacher, since the purpose of the hearing is to provide the opportunity for the teacher to answer the charges being brought against him. The protection which the act provides where the termination is the result of a reduction in personnel is not that of a pointless hearing but is rather that found in MCLA 38.105. . . which provides that those tenure teachers thereby terminated shall be appointed to the next vacancy.⁵⁸

School boards may, if they choose, offer a hearing at the district level to tenured teachers being laid off. If a hearing is approved the minimum standards of due process must be granted. However, school board hearings tend to be time consuming and costly. It is advisable, whenever lay off is contemplated, to offer each notified teacher the opportunity to meet and confer with school administrative officials for the purpose of reviewing the teacher's file in order to ascertain his exact certification status, teaching evaluations, and experience record. The purpose of the conference is to determine whether the record on which the lay-off decision will be made is complete and accurate. A

⁵⁵ Holton Pub. Schs. v. Farmer, 77 Mich. App. 765, 259 N.W.2d 219 (1977).

⁵⁶ As used here the term "tenured teachers" includes second-year or third-year probationary teachers who have not been terminated for unsatisfactory services. Holton Pub. Schs. v. Farmer, 77 Mich. App. 765, 259 N.W.2d 219 (1977).

⁵⁷ Chester v. Harper Woods Sch. Dist., 87 Mich. App. 235, 273 N.W.2d 916 (1978); Anderson v. Harper Woods Sch. Dist., 74 Mich. App. 227, 253 N.W.2d 718 (1977); Steeby v. Highland Park Sch. Dist., 56 Mich. App. 395, 224 N.W.2d 97 (1974).

⁵⁸ Steeby v. Highland Park Sch. Dist., 56 Mich. App. at 399, 224 N.W.2d at 99.

fair and judicious review of the teacher's entire personnel record with the teacher present and an opportunity to correct or add to the information may prevent mistakes at the local level and avoid costly appeals to the courts or Tenure Commission.

Tenured teachers have the right to appeal a local board's lay-off decision to the Tenure Commission since the Tenure Act⁵⁹ provides teachers the right to appeal any adverse decision by a local board.⁶⁰ A hearing before the board of education is not a condition precedent to the Tenure Commission assertion of jurisdiction.

The right to appeal a lay-off to the Tenure Commission is limited to thirty days provided the board of education has furnished the teacher with a statement of his rights under the Tenure Act at the same time that the lay-off notice was given.⁶¹ The Court of Appeals has ruled that the thirty-day statutory limitation for filing an appeal with the Tenure Commission is tolled when the board of education fails to give a "statement of rights" under the act.⁶² In concluding that the thirty-day statute of limitations was tolled unless a teacher is properly notified of his rights, the court in *Biberstine* expressed its concern that teachers might not be aware of the brief statutory thirty-day appeal board. The court stated:

In light of the board's failure to notify the plaintiff of his rights under the teachers' tenure act, it is not unlikely that plaintiff was unaware of his right of appeal to the State Tenure Commission. We hold, therefore, that where, as here, a board of education attempts to discharge a teacher without fully complying with the various provisions of the teachers' tenure act, the 30-day limitation in which the teacher has to appeal to the State Tenure Commission is tolled until such time as the school board makes its decision in accordance with the teachers' tenure act.⁶³

⁵⁹ MCLA 38.121, MSA 15.1021.

⁶⁰ *Goodwin v. Kalamazoo Bd. of Educ.*, 82 Mich. App. 559, 267 N.W.2d 142 (1978); *Chester v. Harper Woods Sch. Dist.*, 87 Mich. App. 235, 273 N.W.2d 916 (1978); *Freiberg v. Big Bay De Noc Bd. of Educ.*, 61 Mich. App. 404, 232 N.W.2d 718 (1975).

⁶¹ *Goodwin v. Kalamazoo Bd. of Educ.*, 82 Mich. App. 559, 267 N.W.2d 142 (1978).

⁶² *Biberstine v. Port Austin Sch. Dist. No. 9*, 51 Mich. App. 274, 214 N.W.2d 729 (1974).

⁶³ *Id.* at 278, 214 N.W.2d at 732.

Biberstine involved a situation where the discharge was for "cause." However, the statutory appeal period is the same for an economic termination decision and notification of the teacher's rights is required.⁶⁴ Commenting on the application of the requirement of a statement of rights to an economic lay-off, the court stated:

If a teacher is to be afforded the right to tenure commission review of a board's 'economic necessity' termination, the teacher must be properly notified of his or her right to that review. When, as here, a teacher alleges that a termination for economic necessity is a mere subterfuge, he or she is, in effect, alleging that the termination is a discharge or demotion without reasonable cause. To allow a board to discharge on the pretext of economic necessity, not inform the teacher of appeal rights and then hold the teacher to the 30-day limit would allow the board to profit from its own wrong doing.⁶⁵

To forestall appeals after the thirty-day period, the controlling board only needs to notify the teacher of the right to appeal the lay-off for economic necessity. If adequate notice is not given, this failure tolls the running of the statute. The thirty-day limited period for appeal by a tenured teacher does not begin to run until the procedural requirements of the Tenure Act have been followed.

Jurisdiction of Tenure Commission

The Tenure Commission has jurisdiction to determine, as a factual matter, whether the local school board laid off teachers because of a bona fide need to reduce its staff.⁶⁶ In Freiberg v. Big Bay De Noc Board of Education,⁶⁷ the court posed as the question before it;

[D]oes the teacher tenure commission have jurisdiction to review the action of a school board which has terminated a tenured teacher's employment on the grounds of

⁶⁴ Goodwin v. Kalamazoo Bd. of Educ., 82 Mich. App. 559 267 N.W.2d 142 (1978).

⁶⁵ *Id.* at 572, 267 N.W.2d at 148.

⁶⁶ Chester v. Harper Woods Sch. Dist., 87 Mich. App. 235, 273 N.W.2d 916 (1978); Freiberg v. Big Bay De Noc Bd. of Educ., 61 Mich. App. 404, 232 N.W.2d 718 (1975).

⁶⁷ 61 Mich. App. 404, 232 N.W.2d 718 (1975).

'necessary reduction in personnel', in order to determine whether, as a factual matter, the reduction in personnel was made in good faith or as a subterfuge to deprive a teacher of his or her rights under the tenure act?⁶⁸

The court answered its own question in the affirmative.

In Freiberg, a seven-year teacher had been laid off due to an alleged "necessary reduction in personnel" because of economic necessity. Freiberg complained that class assignments were "juggled" in order to make him a candidate for lay off and that the subsequent lay-off was not due to any financial problem or enrollment change. A further complication in Freiberg was the fact that a new probationary teacher was hired to fill a vacancy left by a retiring teacher. Freiberg complained that a simple reassignment of a veteran teacher would have made room for him in an area of his certification. The court held that the Commission did have jurisdiction to hear the complaint and directed the Commission to make a factual determination as to whether the local school board's action was a bona fide administrative (economic) necessity or a mere subterfuge. The court based its holding on the ground that the purpose of the Michigan Teachers' Tenure Act was to prevent deleterious practices of school boards, namely, the discharge of teachers "in order to effect economies either by diminishing the amount of work assigned to those retained, or by creating vacancies to be filled by lower salaried, inexperienced employees."⁶⁹ On remand, the Commission majority determined that the decision was based on administrative necessity and upheld the lay off.⁷⁰ After its holding in Freiberg, the Commission announced in a later case the following as the policy it would follow in lay-off and recall situations:

These Commissioners are aware of the opportunity school boards have, if they are so inclined, to circumvent the provisions of the Tenure Act by juggling assignments and manipulating course offerings in a manner which would cause a lay-off or block the recall of a tenured teacher. The result of such action is the effective dismissal of a tenured teacher without observing the due process provision of the Act. Upon appeal, we will scrutinize any such complaint to determine if a board's actions

⁶⁸Id. at 409, 232 N.W.2d at 720.

⁶⁹Id. at 413, 232 N.W.2d 722, quoting 37 Mich. L. Rev., 430-31 (1939).

⁷⁰Freiberg v. Big Bay De Noc Bd. of Educ., TTC 71-36-2.

were made in good faith, and will discourage the employment of any new teacher when tenured teachers are on lay-off.⁷¹

Recall Rights of Laid Off Teachers

Reappointment of teachers after a necessary staff reduction is controlled by the Teachers' Tenure Act.⁷² As previously stated, the Attorney General⁷³ and the Tenure Commission⁷⁴ have held that a school board may not refuse employment to a tenured teacher while a probationary or substitute teacher continues to occupy a position for which the tenured teacher is certified and qualified to fill. Judgment on rehiring is left to the board of education⁷⁵ but MCLA 38.105, MSA 15.2005, requires that recall preferences be given to tenured faculty over probationary faculty.

There is no statutory requirements that a local school board hold a hearing to determine which teachers are to be recalled from layoff.⁷⁶

⁷¹ *Chester v. Harper Woods Sch. Dist.*, TTC 73-64 at 6.

⁷² MCLA 38.105; MSA 15.2005.

⁷³ 1961-62, p. 264, OAG No. 3609 (Feb. 7, 1962).

⁷⁴ *Maciak v. Center Line Pub. Sch.* TTC 78-18; *Billideau v. Boyne Falls Pub. Sch.*, TTC 75-39.

⁷⁵ *Anderson v. Harper Woods Bd. of Educ.*, 74 Mich. App. 227, 253 N.W.2d 718 (1977); *Holton Pub. Sch. v. Farmer*, 77 Mich. App. 765, 259 N.W.2d 219 (1977); *Kimichik v. Rudyard Area Sch.*, TTC 78-29. It is critical that a school board make the reappointment of a laidoff teacher as soon as a vacancy occurs. In *Maciak v. Center Pub. Sch.*, TTC 78-18, a position for which Maciak was certified and qualified became vacant on January 27, 1978, but she was not reappointed until February 8, 1978. A substitute taught during the intervening period. Despite the assertion of the board of education that it delayed the reappointment while determining whether to eliminate the position because of economic necessity, the Commission held that Maciak's reappointment should have taken effect on January 27, 1978. The board was directed to pay Maciak all salary lost for the period January 27 to February 8.

⁷⁶ *Anderson v. Harper Woods Sch. Dist.*, 74 Mich. App. 227, 253 N.W.2d 718 (1977); *Holton Pub. Sch. v. Farmer*, 77 Mich. App. 765, 259 N.W.2d 219 (1977); *Kimichik v. Rudyard Area Sch.*, TTC 78-29. If a board of education grants a hearing on either layoff or reappointment, it must follow due process. See *Maciak v. Center Line Pub. Sch.*, TTC 78-18.

Since the Tenure Commission has jurisdiction to review the action of a school board which has terminated a tenured teacher's employment on the grounds of necessary reduction in personnel,⁷⁷ and the Tenure Act provides tenured teachers the right to appeal any adverse decision by the local board, questions of recall may be appealed to the Tenure Commission.⁷⁸ In reappointment cases, the Commission has the authority to determine whether the controlling board manipulated its teaching assignments to deny a teacher his right to recall.

The Commission, in reviewing the decision of a school board that a tenured teacher is not qualified for an available position, is constrained to apply the qualifications set out by the school board unless the criteria are arbitrary, unreasonable, or promulgated in bad faith.⁷⁹ The Commission has the authority to determine whether the board of education, under the guise of a necessary reduction in personnel, used circuitous methods in laying off a teacher or denying recall.

In recall situations, a board of education cannot manipulate scheduling and assignment of classes in order to prevent the recall of a tenured teacher. Although a controlling board may reschedule classes and adjust teaching assignments to accommodate the return of a tenured teacher who has been laid off due to a necessary reduction in personnel it is not required to do so. This point is well illustrated in Valesano v. Board of Education of the White Pine School District.⁸⁰ Valesano was laid off at the end of the 1975-76 school year. In 1976-77 and 1978-79, the board employed a probationary teacher to teach a combined French-English assignment. Valesano was certified to teach English but not French. She informed the board that she would accept a part-time teaching assignment. The board had decided it wanted the French teaching assignment as part of a full-time assignment in order to attract applicants. The Commission held that the board had properly exercised its authority in combining the French and English classes in one full-time assignment and that the English portion of the assignment was not a "vacancy" open to Valesano.

The Tenure Commission can order tenured teachers on layoff be assigned to part-time assignments, if available, in preference to staffing the part-time position with substitutes or probationary

⁷⁷ Frelberg v. Big Bay De Noc Bd. of Educ., 61 Mich. App. 404, 232 N.W.2d 718 (1975).

⁷⁸ Billideau v. Boyne Falls Pub. Sch., TTC 75-39.

⁷⁹ Chester v. Harper Woods Sch. Dist., 87 Mich. App. 235, 273 N.W.2d 916 (1979); Maciak v. Center Line Pub. Sch., TTC 78-18.

⁸⁰ TTC 78-47.

teachers. The Commission, however, will not order a school board, to fragment a probationary teacher's schedule in order to create an assignment for a laid off tenured teacher.⁸¹

A board of education cannot rehire a laid-off tenured teacher on a day-to-day substitute basis, even if the teacher voluntarily accepts the substitute teacher status and salary, instead of a regular classroom teaching assignment. The Commission has held that when a controlling board failed to offer a permanent teaching position, when one was available, and instead assigned the teacher to the position of substitute, this constituted a demotion. The teacher was entitled to a permanent assignment. The Commission directed the controlling board to pay all salary lost.⁸²

Certification and Qualification Questions

The legislature contemplated that both certification and qualification of a tenured teacher are to be considered when layoff and recall are involved. There is a distinction between the two terms. Definitions of "certified" and "qualified" are crucial to layoff and recall.

Certification, as used in MCLA 38.105, MSA 15.2005, is clear. The State Board of Education has the duty and power in MCLA 380.1531, MSA 15.41531, to determine the requirements for and issue all licenses and certificates for teachers in the public schools. Teacher certification requirements are set forth in the Department of Education publication, Certification Manual for School Officials (June, 1975) and the Teacher Certification Code.⁸³ Whether a teacher is properly certified is not subject to local board discretion.

⁸¹ Billedeau v. Boyne Falls Pub. Sch., TTC 75-39. In Billedeau the school principal was assigned one class that Billedeau was certified to teach. The board employed full-time probationary teachers and some had one class assigned for which Billedeau was certified to teach. The Commission ordered "... the board to reappraise any or all teaching positions filled by probationary teachers. If single sections can be reassigned from a probationary teacher and/or an administrator in such a way as to continue to offer a full-time position to the remaining probationary teacher and/or administrator, such a reassignment should be made." *Id.* at 2.

⁸² Masters v. Hamtramck Bd. of Educ., TTC 77-20. A rehearing was requested in this matter. The board's claim of new evidence was rejected. TTC 77-20-2.

⁸³ 1973 AACR R 390.1101 et seq.

The meaning of the term "qualified," as it appears in the statute, is not easily ascertained but does refer to some standard in addition to the requirements for certification. In his concurring opinion in *Anderson v. Harper Woods*, Justice Cavanagh stated: "It is unfortunate that nowhere does the tenure act define the term 'qualified' nor does the act indicate the means by which the statutory preference for tenured teachers is to be implemented."⁸⁴

The criteria for qualification require the judgment of local boards,⁸⁵ and the Tenure Commission is not free to substitute its judgment for the local board.⁸⁶ In *Chester*, Judge Simon stated for the majority:

It (the Tenure Commission) may no more redefine the criteria of 'qualification' set by the board than outline new standards of 'certification' set by the State. To set the parameters of qualifications to fill vacancies is a function of the school board which may not be usurped by the Tenure Commission. . . . It is the school board which determines the criteria of qualifications. . . . because it is the local board, not the State Tenure Commission, who is charged with the duty of hiring duly qualified teachers both initially and after lay-off.⁸⁷

⁸⁴ *Anderson v. Harper Woods Bd. of Educ.*, 74 Mich. App. 227, 231, 253 N.W.2d 718, 720 (1977).

⁸⁵ *Holton Pub. Sch. v. Farmer*, 77 Mich. 765, 259 N.W.2d 219 (1977); *Chester v. Harper Woods Sch. Dist.*, 87 Mich. App. 235, 273 N.W.2d 916 (1979); *Anderson v. Harper Woods Sch. Dist.*, 74 Mich. App. 227, 253 N.W.2d 718 (1977).

⁸⁶ *Chester v. Harper Woods Sch. Dist.*, 87 Mich. App. 235, 273 N.W.2d 916 (1979).

⁸⁷ *Id.* at 245-246, 273 N.W.2d at 920. The Court of Appeals rejected the Commission's attempt to equate years of teaching experience with qualifications. The court stated:

The majority of the commission completely disregarded this basis (the board's) in favor of its own. Without ever considering whether the criteria adopted by the board was arbitrary, unreasonable or promulgated in bad faith, the majority erroneously chose to view qualification purely from a perspective of teaching experience. Indeed its opinion is replete with reference to 'new hires.' For example, with regard to Mr. Chester they state: 'The two English vacancies in dispute were filled by two newly hired, newly graduated teachers. Surely Chester was at least as qualified as a new hiree who had no teaching experience.' *Id.* at 247, 273 N.W.2d at 921.

The role of the Tenure Commission in reviewing the school board's action was also described by Judge Simon.

[I]n reviewing the determination of a school board that a tenured teacher is not qualified for an available position the Tenure Commission is constrained to apply the criteria of qualifications set out by the school board unless that criteria itself is either arbitrary, unreasonable or promulgated in bad faith.⁸⁸

It is the function of the board of education, and not the Commission, to establish the standards for qualifications and to determine which tenured teachers best meet the standards. Before the Tenure Commission can consider the question of whether assignments were juggled or course offerings manipulated by the local board in order to layoff tenured teachers or prevent their recall, it must first be determined whether the school board's criteria for qualification are either arbitrary, unreasonable, or promulgated in bad faith. If the Tenure Commission decides the board's criteria are acceptable, within the guidelines as described above, it may then review whether the complaining teachers are qualified for any of the present vacancies or would have been qualified had no rescheduling occurred.

One question which has arisen, and been answered by the Tenure Commission, is whether a school board must use seniority as one of the ingredients of qualification. In *Kimichik v. Rudyard Area Schools*,⁸⁹ the teacher contended that when a local board of education recalls teachers from layoff, seniority must be read into the Teachers' Tenure Act to resolve any conflicts that arise between tenured teachers competing for a vacancy. The Commission noted that in *DeFrain v. River Rouge School District*⁹⁰ it had held that "... seniority is a right solely by contract. . ." and "... that the subject of seniority is to be a subject of mandatory bargaining."⁹¹ In *Kimichik* the Commission held that "a school board's failure to accord preference to the teacher with greater seniority when recalling tenured teachers following a necessary reduction in personnel does not violate rights protected by the Teachers' Tenure Act."⁹² The same legal principle probably applies to layoff situations.

⁸⁸Id. at 246, 273 N.W.2d at 920.

⁸⁹TTC 78-29.

⁹⁰TTC 77-29.

⁹¹*Kimichik v. Rudyard Area Sch.*, TTC 78-29 at 6.

⁹²Id. at 7.

The Tenure Commission, on appeal of a tenured teacher, has jurisdiction to review the action of a school board in order to make a determination as to whether the reasons advanced for staff reduction were the actual reasons or whether "juggling" of assignments or manipulation of course offerings occurred in a conscious effort to circumvent the Tenure Act and deny employment to a tenured teacher. In reviewing local school board decisions, the Commission may not substitute its judgment for that of local school boards. In establishing the standards for qualifications of tenured teachers laid off as against those retained or to substitute its judgment as to which teachers best meet the standards.

Commission and Court Rulings

In order to gain an understanding of how the Commission may rule on future reduction in staff questions, a summary of four cases is presented.

The Freiberg Case. This case involves a teacher who was laid off. In 1971, Freiberg, a tenured teacher certified to teach all subjects in grades seven and eight and biology and conservation in grades nine through twelve, was laid off along with another teacher for economic reasons. A schedule was developed giving Freiberg's assignments in biology and conservation to senior teachers. Later, a high school teacher resigned creating a vacancy which Freiberg was not certified to fill. A new teacher was hired to fill the vacancy.⁹³

⁹³ Freiberg has had an interesting history. At the beginning of the 1971-72 school year Freiberg was laid off allegedly for financial, legal and enrollment reasons. On appeal, the Tenure Commission ruled that school boards are within their rights to determine the number of professional staff to be hired, and that an investigation into the necessity or reasons for layoffs would soon abrogate the right of school boards. *Freiberg v. Big Bay De Noc Sch. Dist.*, TTC 71-36. On appeal to the Court of Appeals the matter was remanded to the Tenure Commission on a holding that a decision of a school board was reviewable by the Commission in order to determine as a factual matter whether a reduction in personnel was made in good faith or as a subterfuge to deprive a teacher of rights under the Tenure Act. *Freiberg v. Big Bay De Noc Sch. Dist.*, 61 Mich. App. 404, 232 N.W.2d 718 (1975). The Commission found that the facts supported the reduction. *Freiberg v. Big Bay De Noc.*, TTC 71-36-2. The Court of Appeals, however, disagreed with the Commission's finding and reversed, ordering Freiberg's reinstatement with reparation of lost salary. *Freiberg v. Big Bay De Noc Sch. Dist.*, No. 78-1691 Mich. App. (July 23, 1979).

On appeal to the Tenure Commission, Frelberg claimed that if another teacher, who taught science in junior high school, had been reassigned to the high school vacancy for which that teacher had major and minor certification instead of the new hire, he (Frelberg) could have been assigned to the science schedule in junior high for which he was certified. Frelberg claimed that the board had purposely rearranged class schedules creating a situation whereby he could be laid off by circuitous methods under the guise of a necessary reduction in personnel and that there were no financial exigencies requiring the termination of his employment. The Commission majority held that the facts supported the administration's need for the reduction, that it was made in good faith and was not a circuitous method to remove a tenured staff member.⁹⁴ When Frelberg appealed the Commission's second decision on his layoff, the Court of Appeals,⁹⁵ in an unusual step, reviewed the entire record and reversed the Commission's holding. The court found that "Numerous and significant contradictions appear in the record which directly refute the financial, enrollment and legal difficulties asserted by the board of education to justify plaintiff's layoff."⁹⁶ The court found that the superintendent's testimony was contradicted by all the other witnesses and noted that the superintendent held a personal animus for Frelberg. The court found that despite its alleged financial difficulties, the school district expanded existing programs, added a new program in home economics to its curriculum and hired a new teacher for this addition, without apparently eliminating any previously existing programs, and that on the opening day of school when Frelberg was informed of his economic layoff, total school enrollment was twenty-five above that projected.⁹⁷ The decision of the Court of Appeals sustains the dissenting opinion of commissioner Schoenrath in the Commission's first Frelberg decision.⁹⁸ The Court of Appeals stated:

Commission member Donald A. Schoenrath issued a strong dissent from the Commission opinion. His dissenting opinion concluded not only that the Commission had jurisdiction to decide the dispute, but also that the record 'clearly shows the Appellee Board and its agents deliberately and blatantly schemed to arbitrarily and capriciously rid themselves of a qualified and capable teacher.'⁹⁹

⁹⁴Frelberg v. Big Bay de Noc Sch. Dist., TTC 71-36-2.

⁹⁵Frelberg v. Big Bay de Noc Sch. Dist., No. 78-1691, Mich. App. (July 23, 1979).

⁹⁶Id. at 2, slip opinion.

⁹⁷Id. at 3, slip opinion.

⁹⁸Frelberg v. Big Bay De Noc Sch. Dist., TTC 71-36.

⁹⁹Frelberg v. Big Bay De Noc Sch. Dist., 61 Mich App. 404, 408, 232 N.W.2d 718, 720 (1975).

The Chester Case.¹⁰⁰ Chester involved four laid-off teachers seeking reappointment. Two teachers in Harper Woods, Chester and Goodwin each taught elementary physical education. In 1972, the board ordered a cutback in instructional services. The physical education program was discontinued. Goodwin was deemed qualified to teach in a regular elementary classroom and Chester was laid off. In 1973, a full program was reinstated but with only one elementary physical education teacher. Goodwin was reassigned to teach physical education and a new teacher hired for the elementary classroom which he vacated. Chester complained that he was not hired to the first vacancy for which he was certified and qualified when he was not selected to fill the elementary physical education position. The Commission decided that the reassignment of Goodwin to the one physical education teaching position rather than reappointment of Chester, was administratively appropriate.

However, Chester was also certified to teach English in the secondary school, and two English teaching vacancies were filled in 1973, with new hires, newly graduated teachers. The Commission held that Chester should have been assigned to one of the English vacancies since he "was at least as qualified as a new hiree who had no teaching experience."¹⁰¹

Another teacher, Stevens, who primarily taught science in grades eight through twelve with fourteen years experience was laid off. He was certified to teach all subjects in grades seven and eight (general science major) and physical education in grades kindergarten through twelve. Stevens claimed that two new hires filled positions for which he was certified and qualified. One new hire, a newly graduated teacher, was assigned one chemistry class. The board asserted this administrative decision was made to provide students with a choice between two chemistry teachers. In addition, a new graduate was assigned three seventh-grade mathematics classes and two general science classes. The school board asserted that the new graduate was more qualified than Stevens because the new teacher held a minor in mathematics. The Tenure Commission majority was not impressed with the board's reasoning and held that this was the vacancy to which Stevens was entitled and that he should have been recalled.

Another teacher, Rieckhoff with 19 years experience was laid off. He was certified to teach music (K-12), with a major in applied music and minors in music theory, music literature, and social studies. In 1973, an elementary vocal music position was created and filled by a new hire, an inexperienced teacher certified as an elementary teacher with a major in music. Transcripts indicated that Rieckhoff and the new teacher had equal training in chorus. The school superintendent

¹⁰⁰ Chester v. Harper Woods Pub. Sch., Dist. 87 Mich. App 235, 273 N.W.2d 916 (1979); Chester v. Harper Woods Pub. Sch., TTC 73-64.

¹⁰¹ Chester v. Harper Woods Pub. Schs., TTC 73-64 at 4.

claimed that he was unable to find Rieckhoff's teaching certificate in the personnel files and therefore was unable to make a determination of Rieckhoff's qualifications. Rieckhoff testified that he had examined the file at the time he was laid off and that a copy of his state certification was in the file at that time. The Commission majority held that Rieckhoff should have been recalled.¹⁰²

Another teacher, Sustrick had taught for five years and had a major in geography and a minor in history for grades nine through twelve. Sustrick made no claim to an assignment in his major or minor fields, but argued that "imaginative scheduling would have created an assignment for him in seventh and eighth grades."¹⁰³ The Commission found that Sustrick's complaint had credence since nineteen new hires were employed beginning with the 1973-74 school year.

In summary, the Commission majority stated: "[I]t is clear to this Commission that, had the reassignment of all laid off teachers been a priority of the school board, it could have accomplished with all teachers teaching in assignments for which they were certified and legally qualified."¹⁰⁴

It found that Chester, Stevens, and Rieckhoff were denied positions for which they were certified and qualified to teach and that the board did attempt to block the reemployment of Chester, Stevens, and Sustrick by manipulating class schedules.

¹⁰² Rieckhoff, after being laid off in Harper Woods, secured a teaching position in Detroit, where he obtained tenure. Following the Commission's decision as described above, he was offered a position in Harper Woods as a probationary teacher but would be required to resign his Detroit job. On appeal, the Commission ordered that he be reinstated as a tenured teacher in Harper Woods. *Rieckhoff v. Harper Woods Sch. Dist.*, TTC 76-44.

¹⁰³ *Chester v. Harper Woods Pub. Schs.*, TTC 73-64-R at 6.

¹⁰⁴ *Chester v. Harper Woods Pub. Schs.*, TTC 73-64 at 6. It cannot be implied from the Commission's ruling in *Chester* that it will require manipulation of schedules to accommodate laid off teachers. In *Page v. Harper Woods Sch. Dist.* TTC 73-60-R the Commission held that the Teachers' Tenure Act does not require a local board to manipulate its schedule to accommodate the particular certification of a tenured teacher laid off due to a necessary reduction in personnel. Where a board acts in good faith to staff its programs with teachers holding proper certification and appropriate qualifications as determined by the board, the Commission's jurisdiction is limited. Accord: *Maciak v. Center Line Pub. Sch.*, TTC 78-18.

This case was heard by the Court of Appeals and, as discussed earlier, it held that "the Tenure Commission failed to accord the board's determination of "qualification" the deference it was due.¹⁰⁵ The matter was remanded to the Commission for reconsideration consistent with the court's decision.¹⁰⁶ Sustrick was not a party in the case before the Court of Appeals.

The Brumbaugh Case.¹⁰⁷ The Lincoln Park Board of Education retained probationary teachers on its staff to teach elementary physical education and elementary vocal music. When employing these teachers, the board had required that applicants have a major in the special subject plus an elementary teaching certificate. Laid off tenured teacher, with elementary teaching certificates, appealed to the Commission claiming they should be appointed to the "special" physical education and music positions by virtue of their certification which authorized them to teach all subjects in the elementary grades. The Tenure Commission upheld the board stating:

The record is void of any evidence that the decision of Appellee in the fall of 1972 to reinstate the programs in elementary physical education and elementary vocal music with the requirement that teachers in these areas have majors in either of these subjects, as well as elementary teaching certificates, was a subterfuge to cover arbitrary and capricious action against Appellants. In this instance, it appears that Appellee acted well within its responsibility to establish

¹⁰⁵ Chester v. Harper Woods Bd. of Educ., 87 Mich. App. 235, 247, 273 N.W.2d 916, 921 (1978).

¹⁰⁶ Id. Judge Bronson concurred with the majority, holding that the local school board, not the Commission, was the body empowered to set the qualifications for its teachers. However, Judge Bronson held that even if the school board had found the teachers were not qualified, the Commission was empowered to determine whether class schedules were manipulated so as to deprive the teachers of positions for which the board had determined they were qualified. At 252, 273 N.W.2d at 922. Judge Bronson would have reinstated Stevens and Chester on the finding that they were terminated by schedule manipulation. He would have remanded only the Rieckhoff matter. At 255, 273 N.W.2d at 924.

¹⁰⁷ Brumbaugh v. Lincoln Park Sch. Dist., TTC 73-73-R.

curriculum and exercise its discretion to determine the qualifications of its teachers.¹⁰⁸

The Page Case.¹⁰⁹ During the 1972-73 school year, the Harper Woods School board decided to establish a vocational education program to supersede its industrial arts program. During that year, teacher Page taught three classes in social studies, his minor area, and two in industrial arts, his major area.

The reduction in the industrial arts program required only one instructor for that curricular area, and an instructor senior to Page was retained. Since Page had no certification in vocational education, he was laid off. A social studies position was available but was assigned to a probationary teacher whose qualifications were determined by the board to be superior to Page's.

The Tenure Commission found that Page met the Harper Woods board's standards for competency as a social studies instructor. It found that the board had followed a practice of assigning teachers, including Page, to teach in their minor academic area. When reinstating Page, the Commission found that there was no economic reason for terminating him or denying him the social studies position.

Summary

It is evident from the preceding discussion that a school board's authority in both layoff and recall of teacher must be in compliance with the Tenure Act which is strictly interpreted.

If a school board for example, in decreasing the number of teaching positions, could choose between a tenured and a probationary teacher both of whom were certified and qualified for the positions still remaining, the board would have the power to nullify the Act's intent. The board would thereby be permitted to do indirectly what the law directly forbids. It is the author's recommendation that school boards and teachers' organizations negotiate clear and concise policies for the reduction of staff consistent with the provisions of the Tenure Act. Numerous excellent master agreement clauses on staff reduction and recall are now in effect in many Michigan school districts.

¹⁰⁸ Brumbaugh v. Lincoln Park Sch. Dist., TTC 73-73-R, at 6 (emphasis added). The Commission's decision in Brumbaugh was issued Feb. 7, 1978, nearly one year prior to the Court of Appeals decision in Chester. Nevertheless, the Commission appears to have been well aware of the requirement that it must give the board's opinion on qualifications the "deference it is due."

¹⁰⁹ Page v. Harper Woods Sch. Dist., TTC 73-60-R.

School boards and teacher organizations should consider and put into effect policies ensuring that teachers will not be selected for dismissal or denied reappointment by reason of residence, age, sex, marriage, race, religion, political affiliation or union activity. It has been recommended that the following points be included in tenure law provisions covering dismissal of teachers due to emergencies:

1. A tenured teacher should not be dismissed while a probationary teacher is retained in a position which the tenured teacher is qualified to fill.
2. Teachers should be dismissed in reverse order of employment.
3. Tenured teachers so dismissed should be reemployed before probationary teachers are added to the staff.
4. Tenured teachers so dismissed should be reemployed in order of length of service.¹¹⁰

The Teacher's Tenure Act does not empower the Tenure Commission to substitute its judgment as to teacher qualifications for that of the local controlling board and set its own standards for qualifications of teachers. The Commission may only set aside the board's determination of teacher qualifications if it finds the board's decision was arbitrary or capricious or done in bad faith as a subterfuge in order to circumvent the protections afforded by the Tenure Act. Furthermore, the Tenure Commission is not empowered to substitute its judgment for that of a local board of education as to which teachers best meet the board's standards for qualifications.

The Tenure Commission is empowered to determine whether a school board has manipulated class schedules in such a way as to deprive teachers of positions for which they are qualified. Class assignments cannot be juggled in order to terminate or deny reappointment to teachers. The determination of whether the local board has acted in bad faith or as a subterfuge is a question for the Tenure Commission. Because most Michigan school districts are experiencing declining enrollments, it is extremely important that school boards adopt policies and procedures for layoff and reappointment of teachers which are consistent with the intent of the Tenure Act.

¹¹⁰ National Education Association, Trends in Teacher Tenure Through Legislation and Court Decisions, p. 25 (1957).

TRANSFER AND ASSIGNMENT OF TENURED TEACHERS

School Board Authority

It may be stated as a general rule that boards of education, in order to maintain efficiency and to solve personnel problems, have discretionary authority to transfer professional personnel to positions in keeping with their qualifications. Tenure laws were not intended to guarantee a teacher employment in the same school and/or the same position regardless of changing educational policies. The statutes providing for permanent tenure are interpreted as intending only to regulate dismissal for causes personal to the employee.

The assignment of teachers, regardless of whether they hold tenure contracts, is a discretionary right of the board of education, subject to the terms of the teacher's master agreement. If the teacher's contract does not specify the school and class of position (and most do not), school authorities may transfer the teacher from one school and class of position to another. They may do so provided the teacher is qualified for the new position and the transfer and assignment do not violate any provision of the teacher's master agreement.

The Michigan Teachers' Tenure Act does not prohibit a change of grade or school so long as the teacher is retained in a position which he is qualified to occupy under state law.¹¹¹ Transfer of a teacher to a different grade or school does not constitute a demotion.

Michigan school boards also have the power to assign, reassign, or transfer principals, and superintendents. In exercising such power, the school authorities ordinarily have wide discretion, the criterion being what it may determine to be in the best interest of the school district. However, the power to assign and transfer must be exercised in good faith. A transfer may not be made for the purpose of compelling a teacher's resignation. A teacher may not be assigned to a position for which he is not qualified. A teacher's refusal to accept a reasonable assignment which the school authorities have the power to make constitutes grounds for dismissal.

In Michigan, the contract for employment may stipulate the assignment, reassignment, or transfer. Under terms of the contract, the teacher agrees to teach in a school as designated by the school authorities and thus the teacher is under obligation to teach in that school. If the teacher has a right under his contract to an assignment to a particular position, the board has no power to assign him to a different position. Many Michigan school boards use an "annual supplementary contract" for tenured teachers which states the salary for the ensuing

¹¹¹ 1961-62, p. 264, OAG No. 3609 (February 7, 1962)

school year and includes a statement such as the following: "Failure to return acknowledgement of this form before [some specified date], forfeits your rights to placement in present position or building." If the teacher complies with the request, it could be assumed the teacher would possess contractual rights to a position in the building or to his present assignment.

Michigan tenure statutes do not guarantee that a teacher must be retained in a particular school or assigned to teach any particular class or classes. The teacher acquires no vested right to teach any certain class or in any certain school. The statutes providing for permanent tenure were never intended to guarantee employment in spite of reduction in number of pupils or closing of schools. There was never any intention of the legislature to confer upon employees any special privileges to enable them to retain permanently their positions or pay regardless of changing conditions.

Effect of Transfer to Another District on Tenure Rights

A Michigan teacher who has acquired tenure in one district is not subject to more than a one-year probationary period, effective the date of employment, if he takes a position in another district. The employing board has an option, however, of placing such a teacher immediately on continuing tenure.¹¹² Of course, the teacher would have the option of declining the position unless placed on immediate tenure.

The question sometimes arises whether a tenured teacher "transferring in" from another district may be required to serve an additional year of probation, similar to the third year of probation permissible for teachers completing their first two years of employment. It is clear that a tenured teacher who moves to another district cannot be required to serve more than one year of probation. Sixty days before the end of the one probationary year, the board has the option of releasing the teacher or of granting tenure; but it cannot require another year of probation.

Another question which sometimes arises is whether a nontenured teacher who has served one year of satisfactory probationary service and transfers to another district is required to serve one, or two, more years of probationary service before becoming eligible for tenure. Neither the Attorney General nor the courts of Michigan have ruled on this question. The Michigan Teachers' Tenure Act states:

¹¹²MCLA 38.92, MSA 15.1992.

After the satisfactory completion of the probationary period, a teacher shall be employed continuously by the controlling board under which the probationary period has been completed. . . .¹¹³

It seems reasonable to interpret the legislature's intent as requiring each of the first two years of probation to be completed in the same school district. Therefore, if a teacher has completed only one year of satisfactory service before transferring to another district, he would be required to serve a two-year probation period in the new district. However, if the teacher completes a satisfactory two-year probationary period and is eligible for tenure, but decides to transfer, he is probably eligible to be employed as a tenure teacher in his new position.

We may therefore state as a general rule, without support of court opinion or an attorney general's ruling, that if a teacher has taught two years, his work has been deemed satisfactory, and he moves to another district, the controlling board may at its discretion either require one year of probation or place the teacher immediately on tenure.¹¹⁴

Effect on Tenure Rights of Annexation, Attachment, or Consolidation

The question sometimes arises regarding the status of tenured teachers when the district to which they are under contract is annexed by, or attached to, another school district, or becomes part of a consolidated district.

Teachers on continuing tenure in an annexed district may be placed on probation, not to exceed more than one full year, by the controlling board of the annexing district.¹¹⁵

¹¹³MCLA 38.91, MSA 15.1991.

¹¹⁴In *Holton Pub. Schs. v. Farmer*, 77 Mich. App. 765, 259 N.W.2d 219 (1977), the court held that ". . . the teacher who has satisfactorily completed probation, acquiring tenure, must be accorded a favored status vis-a-vis nontenured applicants for available positions for which the teacher is certified and qualified." (At 770-771). It seems to the author that similar favored status should be accorded to a teacher who has satisfactorily completed a probationary period and immediately accepts a teaching assignment in another district.

¹¹⁵In annexation, the voters in the annexed area vote to become part of another district. When a district is disorganized, it is because of too few students or lack of a sufficient number of board members. In consolidation, voters in all districts vote. In annexation, the annexing district continues as a political entity, the annexed district is dissolved, and the board of education of the annexing district assumes control over the annexed area. When a

If a teacher on continuing tenure becomes an employee of another controlling board as a result of school district annexation, consolidation or other form of school district reorganization, he shall be placed on continuing tenure within 30 days unless the controlling board, by a 2/3 vote on an individual basis, places the teacher on not more than 1 year probation.¹¹⁶

The year of probation commences on the date the annexation becomes effective. For example, if district A annexes to district B on December 1, the term of probation ends on November 30 of the next year.¹¹⁷ A teacher who is to be dismissed must be notified that his work is unsatisfactory and given a dismissal notice sixty days before November 30.

All teachers in Michigan school districts which are dissolved and attached to an existing district will have existing contracts honored by the attaching district. The teachers in the attached district may be required to serve a probationary period of not more than one year.

Tenured teachers from an annexing or attaching district retain full tenure rights and cannot be required to serve a one-year probationary period after the annexation or attachment.

When school districts are consolidated, all tenured teachers in all the districts involved may be placed on immediate tenure or on one year's probation, at the discretion of the new controlling board of the consolidated district.

Probationary teachers, in either annexation, attachment, or consolidation, will probably have valid contracts that must be honored by the annexing district, in case of annexation, by the attaching district, in case of attaching, and by the new board, in case of consolidation. But probationary contracts can be terminated by giving sixty days notice before the close of the school year.¹¹⁸

district becomes disorganized, it is attached to another district by the county or intermediate board. In consolidation, if school districts A, B, and C consolidate into D, district D is a newly created political subdivision. 1959-60, pt. 1, p. 181, OAG No. 3364 (September 2, 1959).

¹¹⁶ MCLA 38.92, MSA 15.1992.

¹¹⁷ 1959-60 pt. 1, p. 181, OAG No. 3364 (September 2, 1959).

¹¹⁸ *Id.*

DISCONTINUING SERVICE

Procedure

The Michigan Teachers' Tenure Act provides:

No teacher on continuing tenure shall discontinue his services with any controlling board except by mutual consent, without giving a written notice to said controlling board at least 60 days before September first of the ensuing school year. Any teacher discontinuing his services in any other manner than as provided in this section shall forfeit his rights to continuing tenure previously acquired under the act.¹¹⁹

This statutory provision refers to teachers who are on tenure but have not yet signed a contract to teach for the ensuing school year. (Such teachers may also resign within sixty days with the board's consent.¹²⁰) The "discontinuance of services" must be in the nature of termination of employment, with an intention to sever the employer-employee relationship.¹²¹

The legislature's intent in adopting this statute was described by the Court of Appeals in Rumph v. Wayne Community School District.¹²²

This section of the statute is clearly designed to prevent teachers from departing a school district immediately before school commences and thus leaving the school board without a sufficient number of teachers, or time to replace them. In addition, the penalty for a teacher's discontinuance in a manner inconsistent with the act is the loss of 'rights to continuing tenure previously acquired under the act.'¹²³

The rights, which are lost under the statute cited above are those rights acquired by a teacher under continuing tenure, and those rights are lost only if the teacher resigns without giving the required sixty-day notice to the school board. The statute provides the sole exception by which a tenured teacher may lose his tenure rights without the necessity of a formal board hearing.

¹¹⁹ MCLA 38.111, MSA 15.2011.

¹²⁰ 1939-40 unnumbered opinion, OAG p. 514 (June 14, 1940).

¹²¹ 1969-70, p. 150 OAG No. 4704 (June 24, 1970).

¹²² 31 Mich. App. 555, 188 N.W.2d 71 (1971).

¹²³ *Id.* at 561, 188 N.W.2d at 74.

Breach of Sabbatical Leave

Our courts have considered the question of whether the breach of a sabbatical leave agreement constitutes a discontinuance of service. In Rumph, a tenured teacher had been granted a sabbatical leave for one school year at one-half pay in order to do research approved by the board, with interim and final reports required. The teacher failed to file a report due in January and did not answer two written inquiries. The school board did not offer the teacher a contract for the next school year. The board alleged that he had breached the sabbatical leave agreement which, it claimed, constituted a discontinuance of services without the controlling board's consent.

In reversing the lower court and finding for the teacher, the Court of Appeals stated:

To affirm the decision of the circuit court could mean that school boards could avoid the procedural requirements of Article IV merely by finding that the teacher had improperly discontinued services under MCLA § 38.111 (stat Ann 1968 Rev § 15.2011). Such a result would certainly discourage a tenure teacher from taking a sabbatical leave, because the possibility would exist that such a determination would be made without the teacher being provided with the procedural protection of Article IV.¹²⁴

The court further stated that the procedural approach of summarily dismissing tenure teachers placed the burden on the tenured teacher to persuade the Tenure Commission that he should not have been dismissed, when the burden should be placed on those making the charges against the tenured teacher.

Strikes

A question has arisen as to whether the withholding of services because of a labor dispute constitutes a discontinuance of services. In considering this issue, the Attorney General reviewed the findings in School District for Holland v. Holland Education Association,¹²⁵ and stated:

The majority of the court held that the teachers temporarily withholding their services because of a labor dispute were, nevertheless, employees of the district even though not under contract with the school district. . . . If they are considered employees for the purposes of Act 336,

¹²⁴Rumph v. Wayne Community Sch. Dist., 31 Mich. App. 555, 562 118 N.W.2d 71, 74, 75 (1971).

¹²⁵380 Mich. 314, 157 N.W.2d 206 (1968).

PA 1947,¹²⁶ . . there is no valid basis to conclude that they are not also employees of the school district for the purpose of the tenure of teachers act. . . It must follow that such teachers have not discontinued their services contrary to Article 2, Section 1, of the Tenure of Teachers Act.¹²⁷

This same question arose in *Shiffer v. Gibraltar Schools*.¹²⁸ The board argued that a teacher who strikes thereby discontinues his services under the Tenure Act and is not entitled to protection of the Act. The *Shiffer* court declined to answer the question holding that the decisions of the Tenure Commission¹²⁹ and circuit court¹³⁰ were res judicata, that is, already decided. The Commission had held, and the circuit court agreed, that there was no legislative intent to deny previously acquired tenure rights to striking teachers. No other cases interpreting the relationship between "discontinuing service" and strikes have been litigated. Current legal principle is that a teacher who strikes does not by that act automatically discontinue his services. A school board does have the authority to discipline or discharge any teacher who strikes under the provision of the Public Employees Relations Act.¹³¹

Preserving Tenure and Resignations

A tenured teacher not under written contract for the subsequent school year who wishes to resign, can preserve his tenure by giving appropriate notice of resignation at least sixty days before September 1 of the ensuing school year. The teacher may resign within the sixty days, provided the board consents, and preserve his tenure.

¹²⁶ MCLA 423.201 et seq., MSA 17.455(1) et seq. Also Public Employees Relations Act.

¹²⁷ 1969-70 p. 150, OAG No. 4704 (June 24, 1970).

¹²⁸ 393 Mich. 190, 224 N.W.2d 255 (1974).

¹²⁹ *Skubik v. Gibraltar Sch. Dist.*, TTC 68-22. Prior to *Shiffer's* disciplinary discharge, *Shiffer* and other striking teachers including *Skubik* had appealed to the Tenure Commission from the board's notice which charged that by striking the teachers had forfeited their rights to continuing tenure.

¹³⁰ *Shiffer v. Gibraltar Sch. Dist.*, No. 13439 Circuit Court, Ingham County (Dec. 6, 1972).

¹³¹ MCLA 423.206, msa 17.455(6); *Rockwell v. Crestwood Bd. of Educ.*, 393 Mich. 616, 227 N.W.2d 736 (1975).

The phrase "preserve his tenure" means that the teacher who resigns in accordance with the law as described above may not be required to serve a two-year probationary period in another district. If he has preserved his tenure through appropriate timely notice to the board of education or mutual consent, he may be placed on immediate tenure if employed by another board or be required to serve no more than a one-year probationary period. If he has not preserved his tenure through appropriate action, he would be required to serve a two-year probationary period before acquiring tenure in another district.

If the tenured teacher is under contract for the next school year, he cannot resign merely by giving notice sixty days before September 1. He must honor the contract unless the board agrees to release him. After a teacher and the controlling board execute a contract, neither the board nor the teacher can fail to observe its terms except by mutual consent. If the teacher breaks the contract the State Board of Education is authorized to suspend his certificate for a limited period.¹³²

If tenured teachers submit resignations after the sixtieth day prior to September 1 has passed, the board ought to decide whether it wishes to consent to the resignation or whether it wishes to invoke MCLA 38.111, MSA 15.2011. In *Stevens v. DeWitt Public Schools*,¹³³ four teachers submitted resignations during the month of August. The board adopted the following resolution on August 9.

Mr. Moody made the motion that all four resignations be accepted by the Board and invoke Article V, Section 38.111 of the Michigan State School Code. Mr. Decatur seconded this motion. Ayes - 6, Nays - 0. Motion carried.¹³⁴

The Commission ruled that had the board intended to consent to the resignations it would have stated only "that all four resignations be accepted by the Board." However, when the board added the final phrase, "Invoke Article V, Section 38.111 of the Michigan State School Code," the Commission held it was clear the board intended to invoke the punitive section of MCLA 38.111, MSA 15.2011 resulting in the forfeiture of rights to continuing tenure. The Commission rejected the argument that the board should have taken no action on the resignations to affectuate the tenure forfeiture provisions. Such an

¹³²MCLA 388.1571; MSA 15.1919 (871). This provision has been renewed annually since it is always part of the state aid act. In the 1979-80 state aid act (P.A. 94, 1979 Leg. Ses.) the provision is in Article 16, § 163.

¹³³TTC 77-35.

¹³⁴Id. at 2.

inaction, the Commission held, would result in chaos, placing the teacher in limbo not knowing whether the board's action was a consent to the resignation or revocation of tenure.¹³⁵

The Commission recommended that when resignations are received after the sixtieth day prior to September 1, the controlling board should receive the letters and (1) move to invoke the forfeiture of continuous tenure or (2) move not to invoke the punitive measure of MCLA 38.111; MSA 15.2011, thus preserving continuous tenure for those teachers seeking to resign.

Changing Effective Date of Resignations

The administrative handling of a teacher's resignation must be in conformity with general contract law as illustrated in William v. Flint Board of Education.¹³⁶

A tenured teacher submitted her resignation on November 20, 1970, (a Friday), effective November 23, 1970, (a Monday), but an administrator or his secretary changed the effective date to November 20. On November 20, 1970, the teacher attempted to withdraw the resignation she had submitted earlier in the day. However, school authorities informed her that it was too late to do so. In December, the board of education formally accepted the resignation. The question before the court was whether the teacher's resignation was so altered as to be void as a matter of the law. The Court held that it was, and stated:

It is fundamental law that there must be a meeting of the minds not only to make a contract but also to rescind or modify a contract after it had been made. . . . Plaintiff's resignation was akin to an offer to rescind the contract of employment on November 23, 1970. At this point the board of education had the option to either accept or reject this offer of resignation. However, the board chose to make a counter offer by changing the effective date of the resignation to November 20, 1970. This counter-offer was neither communicated to nor accepted by the plaintiff. Consequently, there was no meeting of the minds on plaintiff's offer to resign or on the board's counteroffer. Inasmuch as there was no meeting of the minds, it follows that the contract between the plaintiff and the board was not rescinded by the tender of plaintiff's resignation.¹³⁷

¹³⁵Id. at 2.

¹³⁶50 Mich. App. 688, 213 N.W.2d 830 (19730).

¹³⁷Id. at 690, 213 N.W.2d at 831. It can be implied from this decision that an acceptance of a teacher's resignation by a school administrator is binding on the teacher and the board.

The court emphasized the right of the teacher to offer a resignation with a specific date of resignation because of the value of benefits in the event of sickness or accident. If the school district could unilaterally change the effective date of the resignation from Monday to the previous Friday, it could thereby possibly deprive the teacher of a valuable benefit. The changing of the dates therefore materially changed the teachers' rights.¹³⁸

Meeting of Minds Crucial. A teacher's offer of resignation must be specific, and hints or suggestions of a resignation, even if made by counsel, cannot be relied on by the school board nor are they binding on the teacher. In Lawson v. Wayne Community School District,¹³⁹ the board of education argued that throughout proceedings before the Tenure Commission and circuit court, the teacher had represented that she would resign due to the atmosphere of animosity engendered between the teacher and board. The only documented suggestion of a resignation was made by the teacher's attorney in closing arguments before the Tenure Commission. He stated: "[I] shall advise my client that it would be fool-hardy for her to go back to teach there after what has happened. And I shall advise her, I will expect she will follow my advise [sic], she will resign from that school system after she has been reinstated and financially made whole."¹⁴⁰

The court held that the above statement could not bind the parties, since it was only the attorney's opinion and conveyed an intention to advise his client to resign. The record was insufficient to find a meeting of the minds as to the issue of resignation.¹⁴¹

In Wright v. Port Huron School District,¹⁴² the facts were sufficient to uphold a teacher's resignation and constitute a finding of the required "meeting of the minds." The court determined that at a conference held between the teacher and superintendent they agreed "to leave things the way they were at the time," and this was found to have meant that Wright would not be teaching. Wright was found to have resigned by mutual consent. The Tenure Commission had reached the same conclusion.¹⁴³

¹³⁸Id. at 691, 213 N.W.2d at 832.

¹³⁹63 Mich. App. 57, 233 N.W.2d 713 (1975).

¹⁴⁰Id. at 61, 233 N.W.2d at 715 (quoting Lawson v. Wayne Comm. Sch. Dist., TTC 69-15). Lawson was later discharged on the original charges. Lawson v. Wayne Comm. Sch. Dist., TTC 76-4.

¹⁴¹63 Mich. App. 57, 233 N.W.2d 713 (1975).

¹⁴²13 Mich. App. 1, 163 N.W.2d 673 (1968).

¹⁴³TTC 66-2.

In Gleason v. Carney-nadeau Public Schools,¹⁴⁴ the Commission held that a "verbal resignation" unanimously accepted by the board of education was "entirely without merit." The resignation was allegedly proffered during a review of Gleason's teaching performance with his principal and superintendent. Gleason tore up his copy of the written evaluation, stated, "That's it, I'm all done," and left the building. He did not return to teach his afternoon classes and called in ill for the entire following week. The Tenure Commission held that the teacher's statement "That's it, I'm all done" required an inordinately broad interpretation to constitute a resignation. Also, the fact that the teacher called in ill the following week was indicative of his belief he had not resigned or abandoned his position.

Acceptance of Resignation. Three cases have come before the Tenure Commission wherein the question of whether a school administrator's acceptance of a resignation is binding on the district or must await board action.¹⁴⁵ The policy of the Commission on this question was first expressed in Morgan v. Gibraltar School District.¹⁴⁶ The teacher was not under contract, the resignation was submitted more than sixty days before September 1, but he attempted to withdraw it. Morgan argued that the letter of withdrawal which was submitted before the board had an opportunity to act on it cancelled the letter of resignation. The Commission, however, concluded that "formal resignation on the part of the controlling board was not a necessary legal step."¹⁴⁷ The Commission held that the letter of resignation is immediately effective when the tenured teacher is not under an existing contract for services, and, provided the letter is submitted more than sixty days before September 1,¹⁴⁸ as required by MCLA 38.111; MSA 15.2011. The mutual consent factor comes into play within the sixty-day period before September 1st.

The Commission's rationale for its policy announced in Morgan was well stated in a later decision:

¹⁴⁴TTC 75-21.

¹⁴⁵Snyder v. Warren Consolidated Sch., TTC 74-17; Clawson v. Clawson Sch. Dist., 71-18; Morgan v. Gibraltar Sch. Dist., TTC 67-11.

¹⁴⁶TTC 67-11.

¹⁴⁷Id. at 2.

¹⁴⁸Morgan mildly indicates that a different ruling might issue if the teacher was under contract or the resignation was given within the sixty-day period before September 1. Litigation after Morgan never reached the questions.

The central thrust of the Morgan decision is that a resignation, once written, gives the board an immediate course of action: to seek a replacement for the teacher who has resigned. It could then be concluded that once a board has acted in good faith, and wholly or in part committed the 'vacated' position, the letter of resignation precludes any rescinding of such action.¹⁴⁹

The policy of the Commission as to the superintendent's and board's roles of accepting resignations was expressed in Snyder v. Warren Consolidated Schools:

[A] resignation once offered may be accepted immediately by the superintendent of schools. Acceptance of the resignation by the board of education is not required under the law and is a ministerial act.¹⁵⁰

Snyder appealed to the circuit court, and the Commission's decision was reversed on grounds that Snyder had revoked his offer to resign prior to its acceptance. (Snyder had tendered his resignation on February 20, 1974, and withdrew it on February 21. Two days later, the associate superintendent accepted the resignation by letter and on February 27, the board formally accepted the resignation.) The circuit court's opinion does not treat the question of whether a superintendent or school administrator in a resignation situation can legally bind the district.¹⁵¹

¹⁴⁹ Clawson v. Clawson Sch. Dist., TTC 71-18, at 1. Without rejecting its policy as first stated in Morgan, the Commission ruled in Clawson that the teacher's resignation was not final because she had acted to reverse her action practically simultaneously with proffering her resignation.

¹⁵⁰ TTC 74-17, at 2. The Snyder resignation can be distinguished from that in Morgan. Morgan was not under contract for the next school year and he resigned prior to sixty days before September 1. Snyder attempted to resign during the school year while under contract.

¹⁵¹ Snyder v. Warren Consol. Sch., No. 75-17333-AA (November 6, 1975), Circuit Court, Ingham County. The court held that Snyder's offer to resign his employment was revoked prior to acceptance and that his purported termination was in violation of the Teacher Tenure Act since (1) there was no written contract of resignation, (2) the letter of February 22 of the associate superintendent indicated that Snyder's offer to resign was not accepted when originally tendered, (3) there was not a clear, unambiguous and unqualified acceptance of Snyder's offer, and (4) MCLA 38.172; MSA 15.2054 provides that 'No teacher may waive any rights and privileges under (The Tenure Act) in any contract or agreement made with a controlling board.' *Id.* at 3.

Nowhere in the circuit court's opinion in Snyder is there a reputation of the Commission's policy that a superintendent can accept a teacher's resignation and board action is merely a ministerial act. In fact, a careful reading of the circuit court's Snyder opinion implies agreement with the Commission's policy. For example, Judge Brown stated: "First (the statute) provides that 'All contracts with teachers shall be in writing and signed. . . ' If Mr. Frum (the associate superintendent) had accepted there would have been a contract formed and it therefore must have been in writing to be enforceable."¹⁵²

Illegality of Coerced Resignation. To prevent avoidance or circumvention of the Michigan Teachers' Tenure Act, the Michigan legislature has provided that:

No teacher may waive any rights and privileges under this act in any contract or agreement made with a controlling board. In the event that any section or sections of a contract or agreement entered into between a teacher and a controlling board make continuance of employment of such teacher contingent upon certain conditions which may be interpreted as contrary to the reasonable and just causes for dismissal, provided by this act, such section or sections of a contract or agreement shall be invalid and of no effect in relation to determination of continuance of employment of such teacher.¹⁵³

This statute prevents the forced resignation of a teacher as a condition of reemployment for the following year. A resignation given without the intention of terminating employment is ineffective and does not deny the teacher's right to tenure.

A practice sometimes considered by school administrators and boards of education to remove a tenured teacher and avoid a hearing is that of negotiating an agreement providing that if the teacher resigns, the board will pay him for the rest of the year. In such a situation in the state of New York, a teacher later decided not to be bound by the agreement. She brought an action to require restoration to her position with full tenure rights. The court ruled for the teacher on the ground that the agreement was not legal.

A dismissal without hearing, charges and findings is illegal. . . If all this can be nullified by dismissal without charges, with or without pay or bonus, the protection of teachers has been removed. For the courts to validate a "waiver". . . by the teacher of such

¹⁵²Id. at 3. (emphasis added).

¹⁵³MCLA 38.172, MSA 15.2054.

rights would be violative of the spirit and public purpose of the act which protects the school system by given permanency to the job of experienced teachers.¹⁵⁴

A non-Michigan case illustrative of duress and undue influence (sometimes termed "constructive discharge") is Odorizzi v. Bloomfield School District.¹⁵⁵ In Odorizzi, the teacher sought to rescind his resignation, alleging that he had been arrested, questioned by police, booked and released on bail, a process which took some forty hours, during which time he had not slept; that immediately after his release, school officials met with him in his apartment and attempted to persuade him to resign because of the nature of the charges brought against him; that the school officials attempted to get him to resign immediately; that the school officials told him he would be suspended immediately if he did not resign with attendant embarrassing publicity; that they represented themselves as his friends and as persons interested in helping him; and that at no time was he given an opportunity to consult an attorney.

The court held that a valid cause of action existed for rescission based on undue influence and stated that undue influence usually involves several of the following elements:

1. Discussion of the transaction at an unusual or inappropriate time.
2. Consummation of the transaction in an unusual place.
3. Insistent demand that the business be finished at once.
4. Extreme emphasis on the untoward consequences of delay.
5. Use of multiple persuaders by the dominant side against a single servient party.
6. Absence of third-party advisors to the servient party.
7. Statements that there is no time to consult financial advisors or attorneys.¹⁵⁶

Duress and coercion have been used by a few school administrators to avoid time-consuming and painful hearings and possible bad public relations. Teachers and teacher union leaders are more knowledgeable about the legal principles of coercion and duress, and the so-called "constructive discharge" should be avoided.

¹⁵⁴ Boyd v. Collins, 228 N.Y.S.2d 228, 11 N.Y.2d 228, 182 N.E.2d 610 (1962).

¹⁵⁵ Odorizzi v. Bloomfield School District, 54 Cal. Rptr. 533, 246 C.A.2d 123 (1966).

¹⁵⁶ *Id.*

When counseling with teachers whose discharge is contemplated, the administrator should scrupulously avoid undue influence or coercion.¹⁵⁷

RETIREMENT

Since January 1, 1979 it is unlawful for a local board of education to require teachers to retire before the age of seventy, despite a provision in the Teachers' Tenure Act authorizing local school boards to adopt reasonable retirement policies.¹⁵⁸ In 1962, the Michigan Supreme Court held that when a school board placed a teacher on an annual contract basis at age sixty, the question of determining the reasonableness of the policy was to be determined by the Tenure Commission.¹⁵⁹ Several cases came before the Commission for adjudication wherein the Tenure Act provision regarding retirement policy was construed.¹⁶⁰ These decisions are, in general, no longer applicable.

¹⁵⁷ It is particularly unfortunate that some administrators offer positive recommendations in exchange for resignations. The author has consistently recommended that if school administrators have proceeded through the evaluation process following the legal principles and professional recommendations included in this study, the need to suggest or encourage a teacher to resign will be unnecessary. Some teachers do not need to be advised to resign after a serious negative review of their evaluations. Others will resign after receiving a copy of the charges filed with the board, or at sometime before a hearing.

¹⁵⁸ MCLA 38.101; MSA 15.2001. "Nothing in this act shall be construed as preventing any controlling board from establishing a reasonable policy for retirement to apply equally to all teachers who are eligible for retirement under Act No. 136 of the Public Acts of 1945 or having established a reasonable retirement age policy, from temporarily continuing on criteria equally applied to all teachers the contract on a year-to-year basis of any teacher whom the controlling board might wish to retain beyond the established retirement age for the benefit of the school system."

¹⁵⁹ School Dist. of Royal Oak v. State Tenure Commission 367 Mich. 689, 117 N.w.2d 181 (1962).

¹⁶⁰ Billitzke v. West Branch-Rose City Sch., TTC 75-23; Aldridge v. Kalkaska Pub. Schs., TTC 73-14; Gartell v. Cheboygan-Otesego-Presque Isle Intermediate Sch. Dist., TTC 72-36; Phelps v. Menominee Area Pub. Sch., TTC 71-21; McLain v. School Dist. of East Detroit, TTC 68-9; Ellingson v. Alpena Sch., TTC 67-10; Wiltsie v. Roseville Pub. Sch., TTC 1963.

In interpreting this statute, the Attorney General held that mandatory retirement systems or policies used as a subterfuge to evade the statute are prohibited.¹⁶⁴

The Federal Age Discrimination in Employment Act, as amended, supersedes the Michigan statute and the following paragraphs describe the retirement policies local school board must follow. Mandatory retirement before age seventy was made unlawful by the 1978 amendments to the law. Changes made in the federal law in 1978 extended from sixty-five to seventy years the upper age limit of employee protection from age discrimination. Thus, any employment decision relative to a person between forty and seventy years of age must be based on the individual's ability or capacity to perform the work in question.

The compulsory retirement of any person under sixty-five years of age became unlawful on April 7, 1978, with such protection extended to persons under seventy years of age after January 1, 1979.¹⁶⁵

A good faith retirement plan was viewed as a valid basis for compulsory retirement unless the plan was a subterfuge to evade the statute prohibiting age discrimination. That exception is no longer permitted unless the person being retired is a highly paid executive or top policymaker who stands to receive at least \$27,000 annually as retirement income.¹⁶⁶

The federal ban on discrimination on account of age applies to public school systems with twenty or more employees. By federal law, it is unlawful to force employees to retire before seventy years of age under any school board policy or master agreement.¹⁶⁷

Persons who believe that they have been discriminated against because of their age in violation of the Act can appeal to the Teacher Tenure Commission (if tenured), or file an application for a complaint in person or by mail with any office of the Michigan Civil Rights Commission. Offices are located at:

1. 103 Insurance Exchange Building
Grand Rapids, Michigan 49502

¹⁶⁴ ___ o. ___ OAG No. 5239 (November 3, 1977).

¹⁶⁵ 29 MSC § 631 (1978)

¹⁶⁶ id.

¹⁶⁷ The Age of Discrimination in Employment Act permits compulsory retirement of employees in institutions of higher education at age 65. Id § 631(d).

2. 1116 S. Washington Avenue
Lansing, Michigan 48913
3. 812 Citizens Bank Building
328 Saginaw Street
Flint, Michigan 48503
4. 900 Cadillac Square Building
Detroit, Michigan 48226

Federal law requires that when a state such as Michigan, has a civil rights enforcement agency, appeals must be taken to the state agency. Nothing in either the federal or state laws prevents a board of education from terminating a teacher before age seventy if the teacher is physically or mentally unable to perform reasonable service to the district.

EXTRA PAY FOR EXTRA DUTY

Under the Teachers' Tenure Act, which was in effect before 1963, a teacher's or administrator's salary could not be reduced when he was relieved of extra duty or responsibility. The usual court interpretation in other states was that a teacher entrusted with a position of extra responsibility, which carried compensation above the salary schedule, was deemed to possess such experience, training, and other qualifications as to command higher pay. He was therefore entitled to continue to receive the higher compensation by reason of such qualifications, regardless of whether he continued to be assigned extra duties.¹⁶⁸

MCLA 38.101, MSA 15.2001, provides that a tenured teacher cannot be demoted except for reasonable and just cause and only after notice and a hearing. The elimination of duties or responsibilities cannot be used as a device for a reduction in salary which is, in effect, a demotion.

In 1963, the Michigan legislature amended the Tenure Act to permit salary reductions when extra services, duties, and/or responsibilities were reduced.¹⁶⁹ As a result, it would now be held that any rights a tenured teacher has under the Tenure Act do not extend to automatic continuation of extra pay for extra duty. If the teacher is relieved of the extra duty and his pay reduced, he has not been demoted.

¹⁶⁸ Board of Education of Nelson County v. Lawrence, 375 S.W.2d 830 (Ky. 1962).

¹⁶⁹ MCLA 38.91, MSA 15.1991.

CHAPTER VI

TENURE RIGHTS OF ADMINISTRATORS

In General

A school administrator holding a valid Michigan teaching certificate¹ is protected by the provisions of the Teachers' Tenure Act in his capacity as a teacher² and, unless the employing board withholds tenure as is permitted by statute,³ in his capacity as an administrator. A school administrator who holds a teaching certificate but is not eligible for tenure as a teacher in the district is protected by the provisions of law applicable to probationary teachers. An administrator who has completed a satisfactory probationary period and thus is eligible for teacher tenure, possesses tenure as a classroom teacher and is eligible for tenure as an administrator.⁴

Eligibility of Administrative Positions for Tenure Status

All administrative positions, including non-instructional supervisory positions are eligible for tenure status. The Tenure Act is

¹ An administrator is not required by statute or State Board of Education Rule to have a teaching certificate. 1963-64, p. 172 OAG No. 4143, August 9, 1963, and letter opinion dated March 23, 1978. Holding a valid teaching certificate, however, is a prerequisite to holding administrative tenure.

² MCLA 38.71; MSA 15.1971 provides "The term 'teacher' as used in this act shall include all certificated persons employed for a full school year by any board of education or controlling board of any public educational institution."

³ MCLA 38.91; MSA 15.1991. The pertinent language is: "If the controlling board shall provide in a contract of employment of any teacher. . . that such teacher shall not be deemed to be granted continuing tenure in such capacity by virtue of such contract of employment, then such teacher shall not be granted tenure in such capacity. . . ."

⁴ Bode v. Roseville Sch. Dist., 405 Mich. 517, 275 N.W.2d 472 (1979).

pertinent part provides: "If the controlling board shall provide in a contract of employment of any teacher employed other than a classroom teacher, including but not limited to a superintendent, principal, department head or director of curriculum. . . ."⁵ The phrase "including but not limited to" authorizes school boards to determine which administrative positions should carry tenure⁶ and which administrators should be granted tenure. The Act cannot be construed by the Tenure Commission or the courts to dictate which administrative positions are eligible for administrative tenure as a matter of law. A school board is free to fashion its administrative tenure policies as it deems most appropriate. For example, one school district may wish to allow principals to gain tenure in their administrative positions while another district may wish to allow only the supervisor of the buildings and grounds to achieve tenure status. These are decisions to be made by each school board and are given effect through individual contract provisions between the board and each of its administrators.⁷

The question has arisen whether an administrator could ever gain administrative tenure in a position which does not involve supervision of instruction. In *Goodwin v. Kalamazoo School District*,⁸ the Tenure Commission mistakenly ruled that since a "Director of Buildings and Grounds" is a position not requiring certification⁹ nor involving instructional supervision, an occupant of such a position could never acquire tenure. The Court of Appeals rejected the Commission's interpretation of MCLA 38.91, MSA 15.1991 and stated:

We read the statute as authorizing individual school districts to determine which administrative positions should carry tenure. Whether a tenured teacher who

⁵MCLA 38.91; MSA 15.1991 (emphasis added).

⁶*Goodwin v. Kalamazoo Sch. Dist.*, 82 Mich. App. 559, 267 N.W.2d 142 (1978).

⁷*Id.*

⁸TTC 75-35. The Commission ruled that since its expertise was limited to the areas of educational activities and not in all aspects of operating a K-12 district it could not hear tenure questions of non-instructional administrators.

⁹The Commission had asserted that the only positions in which a non-classroom teacher can gain tenure are those positions which require "certification" by the State Board of Education. In 1963-64, p. 172 OAG No. 4143, August 9, 1963, the Attorney General ruled that the State Board of Education had no authority to require certificates of administrators since there was no statutory requirement that administrators be certificated. In a letter opinion, dated March 23, 1978, the Attorney General held that the 1975 Certification Manual for School Administrators which requires persons in sixteen named administrative positions to hold Michigan teaching certificates, was promulgated without legislative authority and was not enforceable.

accepts an administrative positions [sic] is to be granted tenure is to be determined by contract between the teacher/administrator and school board. We reject the contention of the parties and the Commission that the statute should be interpreted to dictate categories of administrative positions which carry tenure as a matter of law.¹⁰

As to the claim of the Commission that it was not qualified in non-instructional areas, the Court of Appeals stated "[t]he Commission's claims of lack of expertise in non-instructional fields are beside the point. Their task is to determine whether an individual administrator's contract grants or denies tenure to that administrator. The commission need not look to policies behind a school board's decision to accord tenure to particular positions."¹¹

Restrictions to Specific Classifications on Reassignment

The question has arisen whether administrative tenure can be denied if an administrator holding administrative tenure is offered and accepts another administrative position in the same school district of a different classification, with tenure denied. It has been held that an administrator gains administrative tenure in a specific classification, such as a principal, where administrative tenure has not been excluded in the contract.¹² Once obtained in a particular position, administrative tenure status does not automatically carry over to another administrative assignment.¹³ For example, in *Greenan v. Glen Lake Community Schools*,¹⁴ a superintendent, prior to accepting the position, held tenure in the district as a principal. The Commission ruled the tenure status that the superintendent formerly held as principal did not carry over to the position of superintendent when the controlling board specifically excluded tenure in his contract as superintendent. The Commission's decision followed an earlier announced policy when it held:

... [T]here never was such an all encompassing 'administrative tenure' in the sense that a right could acquire to any available enumerated administrative position acquiring tenure in another administrative position. . . . If one acquires tenure under the present language of Article III, Section 1, in

¹⁰ *Goodwin v. Kalamazoo Sch. Dist.*, 82 Mich. App. 559, 566, 267 N.W.2d 142, 146 (1978).

¹¹ *Id.* at 569, 267 N.W.2d at 147.

¹² *Madison v. Ladeview Pub. Sch.*, TTC 68-12.

¹³ TTC 77-33.

¹⁴ *Id.*

a position other than as a classroom teacher, one's tenure grants only the right to a position of the same category, if available, or the right to return as an active classroom teacher.¹⁵

Three decisions support the Commission's holding on the legal principle that tenure is granted in the "position." The Commission ruled that a principal whose first two annual contracts contained no exclusionary language regarding tenure had gained tenure as a "principal."¹⁶ The Supreme Court held that a principal whose contract contained no exclusionary language regarding tenure gained tenure in her capacity of "principal."¹⁷ The Court of Appeals, in reviewing a Commission decision stated "in view of the Commission's two decisions that plaintiff's contracts as director of building and grounds did not deny him tenure, plaintiff has achieved tenure in that position."¹⁸ The above cases place emphasis on the rule that administrative tenure is in position.

We may state as a general rule that if an administrator's contract does not contain a tenure exclusionary clause, he holds tenure in the position he occupies or of a similar classification or level. If he accepts an administrative position with a different classification, tenure status may be changed at the discretion of the board. The Tenure Commission has ruled, however, that positions in the central administrative offices are the same class. For example, when a supervisor of personnel and instruction was deemed to have tenure, it was held to be tenure "in the central administrative offices of the district."¹⁹

The rule stated above applies to administrators who hold administrative tenure in a position. The question has arisen as to whether the denial of administrative tenure is automatically transferred if an administrator accepts an administrative assignment of a different classification or category. In Fortress v. Jackson Public Schools,²⁰

¹⁵Goodwin v. Kalamazoo Sch. Dist., TTC 75-35 at 8.

¹⁶Madison v. Ladeview Pub. Sch., TTC 68-12.

¹⁷Dodge v. Bd. of Educ. of Sch. Dist. of Saginaw, 384 Mich. 346, 183 N.W.2d 793 (1971).

¹⁸Goodwin v. Kalamazoo Sch. Dist., 82 Mich. App. 559, 569, 267 N.W.2d 142, 147 (1978). (emphasis added).

¹⁹Smiley v. Grand Blanc Bd. of Educ., TTC 76-3.

²⁰TTC 76-16.

the administrator in 1965 had agreed to a contract provision that "[I]t is specifically understood and agreed that you do not have legal tenure in this position, but do have tenure only as a classroom teacher. . . ." ²¹ The Commission held that "[I]t is the belief of the Commission that by said contract Appellant's tenure status was excluded in any position other than classroom teacher." ²² It should be added, however, that the Commission placed considerable weight on the fact that the board had adopted a resolution withholding tenure in all administrative positions. ²³ Because the Tenure Commission in Fortress was critical of the board's method of making contracts with school administrators, it is essential that the relationship between an administrator's contract and his rights to administrative tenure be reviewed.

Contract Provisions

The explicit language of the Tenure Act provides that if the contract of employment of a tenure teacher in the capacity of administrator provides that such teacher shall not have tenure in such capacity, he shall be deemed to have tenure as a classroom teacher only. ²⁴ Whenever a board of education employs an administrator who has completed a satisfactory period of probation and the board does not intend to grant tenure to him in his position, the board must stipulate clearly in the contract that it is not granting tenure in his administrative position. Failure of the board to include an administrative exclusionary clause in the contract will be deemed as granting tenure to the administrator in his administrative position. ²⁵

If an administrator has not yet achieved teacher tenure status, the absence of an exclusionary administrative clause in his contract cannot be relied on by the administrator as a grant of administrative tenure. The case of Anderson v. Westwood School District ²⁶ is illustrative of this point of law. Anderson was given a three-year contract, commencing September 30, 1968, and was terminated October 16, 1969.

²¹ *Id.* at 2.

²² *Id.* at 3 (emphasis added).

²³ *Id.* at 3.

²⁴ MCLA 38.91; MSA 15.1991.

²⁵ Goodwin v. Kalamazoo Sch. Dist., 82 Mich. App. 559, 267 N.W.2d 142 (1978).

²⁶ TTC 70-13. Anderson filed a separate civil action for breach of contract and was awarded damages but was not reinstated. Anderson v. Westwood Sch. Dist., 49 Mich. App. 406, 212 N.W.2d 232 (1973).

Anderson claimed that since his contract did not deny him tenure as an administrator, the board had violated his tenure rights. The Commission held, however, that in order for an administrator to hold tenure status he must meet all other requirements of the Tenure Act. Since Anderson had served only one year under the contract prior to his termination, he had not completed the required two year probationary period. The Commission decided that it lacked jurisdiction because Anderson was not a tenure teacher. Anderson supports the conclusion that tenure status as a teacher is a condition precedent to administrative tenure.

As previously stated, administrative tenure is at the discretion of the board of education, and it may withhold such tenure, but only by stipulating this intent in the administrator's contract. In a case which came before the Michigan Supreme Court, a principal had been denied tenure in his administrative position.²⁷ The contract contained the following provisions: "The conditions of this appointment are: that you are subject to assignment and transfer at the discretion of the superintendent of schools, and subject to the rules and regulations of the board;" and "the teacher with whom this contract is made shall not be deemed to be granted tenure in the capacity of principal under or by virtue of this contract."²⁸

The principal had served as a principal and was assigned duties in mid-year as a "visiting teacher" with no decrease in pay. The Court ruled that he had no tenure as principal because of the wording of his contract and that his removal from the position and reassignment to a teaching position did not constitute a demotion. The rights the principal had to tenure, he possessed by virtue of being a teacher, and they did not extend to his position as a principal. The second phrase quoted from the contract denied him tenure in his position as a principal.

It should be noted, however, that even though the board provided in the contract that it had no intention of granting tenure as an administrator and later transferred him to a teaching position, it was required to pay him the salary it had agreed to pay him as an administrator. Upon expiration of the administrative contract, he continued employment in the district as a teacher at the same salary he would have received had he taught continuously in the district.²⁹

²⁷ Street v. Ferndale Bd. Educ., 361 Mich. 82, 104 N.W.2d 748 (1961).

²⁸ *Id.* at 84, 104 N.W.2d at 750.

²⁹ MCLA 38.91; MSA 1991.

A board of education must follow the means available in the statute if it intends to deny tenure to an administrator in his capacity as administrator. The case of Dodge v. Saginaw Board of Education³⁰ illustrates this point. The plaintiff, a tenured teacher, was employed by the board of education in the capacity of principal. She received contracts for the school years 1963-64, 1964-65, and 1965-66, each of which expressly provided that no tenure as principal was to be acquired thereunder. For the school years 1966-67 and 1967-68, she received a contract in which the language in the previous contracts about nonacquisition of tenure did not appear. In the latter contract the word "teacher" was used, and the word "principal" did not appear. The term "Tenure-Teacher," part of the contract title, had been crossed out with a typewriter and over this was typed in "Elem. Prins."

The school board argued that striking out the word "tenure" from the printed form was the equivalent of meeting the statutory exclusionary tenure provision. The Court disagreed, holding that the board had not met the legal requirements necessary to deny tenure. Even though the Court was satisfied that the board did not intend to grant tenure to Dodge in her administrative position, striking the word "tenure" from the printed form of the employment contract was held not to be the provision required to void the granting of tenure. In order to deny administrative tenure, the Court held, it is necessary for the board to provide specifically that the teacher was not to have tenure as an administrator. The Court directed the board to pay Dodge the salary difference between what she had received as a classroom teacher and what she would have received as principal.³¹

Dodge teaches that if a controlling board wishes to withhold administrative tenure, exclusionary language should be placed in the first and each subsequent administrative contract issued to that administrator. When new contracts are issued for the same position to the same administrator, the exclusionary language must be continued if the board intends to continue to deny administrative tenure. If a school board issues an administrative contract with no exclusionary language, when it intended to exclude tenure, the error cannot be corrected in subsequent contracts.

Despite the strict ruling of the Court in Dodge, administrative tenure has been denied where a school board had adopted a resolution denying administrative tenure to all administrators and issued annual salary notices which referred to the original contract. In Fortress v. Jackson Public Schools³² the Commission ruled that denial of tenure continued through incorporating the original contract tenure exclusion in the salary notice which stated the effective date of salary, the

³⁰384 Mich. 346, 183 N.W.2d 793 (1971).

³¹Id.

³²TTC 76-16.

level and step of the salary schedule applicable and included the phrase "the original of your contract is on file in the personnel office."³³ The use of the "annual salary notice" plus a school board policy denying administrative tenure to all administrators served to deny tenure to Fortress when he was transferred to another administrative position. The specific facts in the case are as follows. Fortress received a contract dated March 16, 1965, appointing him to the position of "Principal of East Junior High School" in Jackson. It stated: "It is specifically understood and agreed that you do not have legal tenure in this position, but do have tenure as a classroom teacher."³⁴

Fortress was assigned to the position of senior high school principal in 1971-72, which continued through the 1974-75 school year. The question before the Commission was whether or not the March 16, 1965, contract denied tenure to Fortress in any administrative capacity. Fortress claimed tenure as high school principal because his March 16, 1965, contract specifically limited tenure exclusion to the position of "Principal of East Junior High School."

The Commission ruled that the 1965 contract excluded tenure status to any position other than classroom teacher, because the board of education had adopted a resolution specifically withholding tenure from administrators. At the end of its decision in *Fortress*, the Commission proffered some good advice. "The Commission recognizes that its decisions are limited to the tenure statute, but we would be remiss in not noting that a more desirable method regarding issuance of contracts could be adopted by Appellee School District."³⁵ Unfortunately, the Commission's advice in *Fortress* was not followed in another district and the results were different.

In *McKee v. Woodhaven School District*,³⁶ the Tenure Commission was confronted with the following issue: Is the failure of a board to execute with an administrator a written contract of employment excluding tenure in a position a grant of tenure status by operation of law? In 1972-73, the Woodhaven Board of Education issued a contract to McKee when he was assigned to the position of assistant principal at a junior-senior high school. The contract contained a clause which excluded tenure to the individual rather than to a specific position. This was the only contract McKee ever signed with the board of education. After the original contract, the terms of McKee's employment were changed in regards to salary, weeks worked, and duties. No yearly notices were issued by the board extending the initial contract.

³³Id.

³⁴Id. at 2.

³⁵Id. at 3.

³⁶TTC 77-12.

In 1975, McKee was assigned the position of middle school principal and a contract was offered which excluded tenure. He declined to sign it. (The Administrative employees and board of education were in dispute at the time over the issue of administrative tenure). At the end of the 1976-77 school year, McKee was removed from his administrative position and assigned to a classroom teaching position. McKee appealed to the Tenure Commission claiming that he held administrative tenure.

The Commission decided that the original bar to tenure status found in the first contract remained effective throughout the years in question when McKee served as assistant principal and as principal. This was true, the Commission held, because MCLA 380.132; MSA 15.4132, specifically provides that the written contract of an administrator shall be extended by operation of law if ninety-days notice of nonrenewal is not given or unless a new contract is executed. Since McKee never received notification of non-renewal, the original contract which excluded tenure was effectively extended. The acceptance by McKee of new compensation, duties, and hours constituted evidence of mutual acceptance.

The Commission held that when McKee refused to sign a contract for the new administrative position which incorporated a tenure exclusionary clause, but accepted salary and other terms of employment, he could not later claim tenure in his new administrative position because he refused to sign the proffered contract. Such conduct, the Commission ruled would effectively deprive a board of education of its statutory authority to determine administrative assignments.

On appeal to circuit court the Tenure Commission was overruled.³⁷ The court construed MCLA 380.132, MSA 15.4132 quite differently than the Commission which had held that the statute operates to renew an administrator's written contract of employment for an additional one year period each time the school district fails to provide the administrator with the mandatory notice of non-renewal of the contract. The circuit court held that the statute operates "at best to renew the written contract to an expressly limited period of one additional year."³⁸ Because the board failed to ever renew McKee's 1972-73 contract, the original was extended for only one year. His employment after the one year statutory extension was under conditions with no administrative tenure denied. The circuit court held that "the law is well settled that the mere intention on the part of the School Board to deny tenure is not sufficient to prevent Mr. McKee from acquiring it"³⁹ and "[t]he Woodhaven School

³⁷ McKee v. Woodhaven Pub. Sch., Circuit Court, Wayne County, No. 79-23042-AA, September 20, 1979.

³⁸ *Id.* at 1.

³⁹ *Id.* at 4.

Board having failed to clearly and explicitly to exclude the right to tenure as required, Appellant McKee has what is commonly known as administrative tenure."⁴⁰

McKee demonstrates that school boards ought to provide timely, annual review of all administrative contracts and comply with renewal provisions as required by statute. The legal principles in Fortress should not be relied on.

Change In Job Responsibilities

A grant of administrative tenure does not restrict the controlling board from changing the job responsibilities of the incumbent. This legal principle was established in Smiley v. Grand Blanc School District.⁴¹ Smiley was employed in August, 1970, as "Supervisor of Personnel and Instruction" and gained administrative tenure after serving one probationary year. In 1975, relying on the advice of an outside consultant, the board of education eliminated the position of "Supervisor of Personnel and Instruction" and reorganized the personnel office to include responsibilities for collective bargaining. Smiley was reassigned to the position of "administrative assistant," but he refused to sign a new contract following unsuccessful negotiations over terms. Later he was assigned to a teaching position. Smiley appealed to the Commission requesting answers to the following questions:

1. Did he have tenure in his position of "supervisor of Personnel and Instruction"?
2. Was he demoted? If so, was the demotion pursuant to the provision of the Tenure Act?
3. Did he attain tenure as an administrative assistant?
4. Was he demoted from the position as administrative assistant? If so, was the demotion in accordance with the Tenure Act?

The Commission ruled that (1) where administrative tenure has not been denied in the contract of "Supervisor of Personnel and Instruction," the tenure is in the central administrative offices of the district; (2) a controlling board cannot be denied the right to reorganize its central administrative staff and change job descriptions of any or all administrators; (3) the reassignment to a teaching position followed the appellant's refusal to agree to an administrative contract; (4) Smiley's claim that his reassignment was a subterfuge to deny him administrative tenure was merely a suspicion and not supported by any

⁴⁰ Id. at 5.

⁴¹ TTC 76-3.

evidence; and (5) Smiley's refusal to sign an administrative contract could be taken as a resignation.

Acquisition of Teacher Tenure While Serving as Administrator

A question has arisen whether one can accumulate probationary service credit and acquire tenure as a classroom teacher by reason of service as an administrator. It has been held that the definition of "teacher" in the Teachers' Tenure Act includes "superintendent" *inter alia*, and that service as a superintendent can qualify one for teacher tenure.⁴² The same legal principle surely applies to all administrative positions. The case of Bode v. Roseville School District⁴³ is instructive on this important point.

Bode was superintendent in Leslie, Michigan, serving under a two-year contract when the Teachers' Tenure Act became mandatory in all Michigan school districts (August 28, 1964).⁴⁴ Bode was not reappointed to his position at Leslie and, by nature of the "grandfather clause" in the Tenure Act, was not qualified for tenure. Bode's first appointment entirely under the Act was as superintendent with the Clintondale School District, from 1967 until 1970, at which time he resigned. After serving part of a year on a day-to-day basis in the Roseville School District, Bode was appointed, as of July 1, 1970, acting superintendent with a one-year contract. A two-year contract began July 1, 1971.

Bode's contract as superintendent included the following exclusionary language: "The Superintendent of Schools shall not be granted continuing tenure by virtue of this agreement."⁴⁵

In October, 1972, the Roseville School Board reassigned Bode to the position of acting superintendent-consultant. About February 7, 1973, Bode received notice that he would not be employed after June 30, 1973, and he appealed to the Tenure Commission.

The Board of Education argued that Bode's contract, which excluded tenure, also precluded him from achieving tenure as a classroom teacher.

The Michigan Supreme Court ruled that Bode completed a two-year probationary period and obtained tenure as a classroom teacher by virtue of his service in the Clintondale School District as superintendent. When he moved to Roseville his service as acting superintendent for one

⁴²Bode v. Roseville Sch. Dist. 405 Mich. 517; 275 N.W.2d 472 (1979).

⁴³*Id.*

⁴⁴MCLA 38.81, MSA 15.1981.

⁴⁵Bode v. Roseville Sch. Dist., 405 Mich. 517, 526, 275 N.W.2d 472, 474 (1979).

year satisfied the requirements of a one-year probationary period⁴⁶ as provided in the Tenure Act.⁴⁷

Bode was never notified that his work was unsatisfactory during either probationary year and therefore received tenure as a teacher. The Supreme Court held that even though Bode's contract denied him tenure as superintendent, the provision could not be construed to deny him tenure as a teacher.⁴⁸ Furthermore, the exclusionary tenure language in his administrative contract could not be applicable to his teacher tenure status because the Tenure Act prohibits a teacher from waiving any rights or privileges.⁴⁹

The Supreme Court in Bode upheld the Tenure Commission, which has consistently ruled that a school administrator who had not acquired tenure by serving as a classroom teacher prior to accepting an administrative post nonetheless earns such teacher tenure for purposes of the Teachers' Tenure Act while employed as an administrator of a local school district even though his contract precludes his earning tenure as an administrator.⁵⁰

Lay off and Recall Rights

Even though an administrator has tenure in his position, a board of education has authority to eliminate the position if the reasons are valid,⁵¹ and the Tenure Commission has a responsibility to make a

⁴⁶The Tenure Commission had held that Bode received tenure as superintendent while serving as acting superintendent. Bode v. Roseville Sch. Dist., TTC 72-45. The Supreme Court disagreed stating, "(p)laintiff could not acquire service toward tenure as a superintendent because the resolution appointing him as acting superintendent clearly indicated that the board considered the superintendents' position still under search." Bode v. Roseville Comm. Sch. Dist. 405 Mich. 517, 530, 275 N.W.2d 472, 476 (1979).

⁴⁷MCLA 38.92, MSA 15.992.

⁴⁸Bode v. Roseville Community Sch. Dist., 405 Mich. 517, 530, 275 N.W.2d 472, 476 (1979).

⁴⁹MCLA 38.172, MSA 15.2054. "No teacher may waive any rights and privileges under this act in any contract or agreement made with a controlling board."

⁵⁰Madison v. Lakeview, TTC 68-12; Lindner v. Ypsilanti School District, TTC 70-24.

⁵¹Goodwin v. Kalamazoo Bd. of Educ., 82 Mich. App. 559, 267 N.W.2d 142 (1978).

factual determination as to whether a school board's decision to reduce personnel is in good faith or an excuse for wrongful discharge or demotion.

If an administrator has a contract with an exclusionary tenure provision he may be terminated as an administrator by the controlling board upon expiration of the contract for any reason or no reason at all. However, whatever rights he has as a tenured teacher are retained. The purpose of this provision is to assure that a tenured classroom teacher who assumes administrative duties under contract does not forfeit thereby the right to return to the classroom as a tenured teacher upon termination of his administrative duties.

Summary

The Michigan Teacher's Tenure Act provides the opportunity for a local board of education to establish tenure policies for school administrators in their administrative positions. It can do so by establishing a probationary period, during which time administrators' contracts will contain a statement that the board is not granting administrative tenure. Upon satisfactory completion of a probationary administrative period, the board can grant administrative tenure by merely dropping the phrase from the new contract.

A review of the decisions related to administrative tenure indicates that local school boards and their chief administrators need to give careful attention to contract administration. School boards should have all administrator contracts prepared with an exclusion of administrative tenure clause. The contracts should be written so as to exclude tenure to the administrator rather than to a specific position. Should the board deem it appropriate to grant administrative tenure, it would be necessary to strike out the exclusionary clause. Such practice would help reduce oversights which result in allowing tenure when it was not intended. A board should not rely on annual salary notices and/or school board policies to deny administrative tenure. The denial should be clearly stated in the administrator's individual contract, which is reviewed and timely renewed as required by law.

School boards should request periodic review of its contracting procedures by their school attorney.

The information presented in this chapter includes several legal principles which have not yet been decided by the higher courts of the state. Appeals of some of these legal principles may change the law.

CHAPTER VII

ACTIONS FOR WRONGFUL SUSPENSION, DEMOTION OR DISCHARGE

Remedies

Authority. In drafting the Michigan Teachers' Tenure Act, the legislature contemplated the need to provide remedial protection for wrongful action of school boards against tenured teachers.

On the filing of charges. . . , the controlling board may suspend the accused teacher from active performance of duty until a decision is rendered by the controlling board, but the teacher's salary shall continue during such suspension: Provided, That if the decision of the controlling board is appealed and the tenure commission reverses the decision of the controlling board, the teacher shall be entitled to all salary lost as a result of such suspension.¹

This language seems to be restricted to only those situations where a school board has suspended a teacher with pay until rendering a decision adverse to the teacher, stopping the teacher's pay and then having its decision reversed by the Tenure Commission. Implied in the statute is the inclusion of the remedial principle of reinstatement. For example, the Tenure Commission has ordered "reinstatement with all lost wages" when a school board incorrectly refused to recall laid-off teachers² and when a board failed to assign a teaching position to a teacher returning from a leave of absence.³ The remedial principle of reinstatement incorporated in the statute has been applied to most wrongful substantive and procedural actions of school boards toward tenured teachers.⁴ Such an interpretation is in harmony with the legislative policy to protect teachers from arbitrary and unreasonable practices of schools boards.

¹ MCLA 38.103, MSA 15.2003.

² *Chester v. Harper Woods Pub. Sch.*, TTC 73-64.

³ *Ross v. Mona Shores Sch.*, TTC 75-30.

⁴ Automatic reinstatement and salary lost are not the only remedies available when a procedural error occurs. In *Pounder v. Harper Woods*, 72 Mich. App. 717, 250 N.W.2d 504 (1976), modified 402 Mich.

The remedy to correct a wrongful suspension without pay, a demotion, or a discharge of a teacher is reinstatement and all back salary lost,⁵ is subject to the "doctrine of mitigation."⁶

Definitions and Remedies. For reinstatement to be granted, the procedural error must interfere with the teacher's basic right to a fair and impartial hearing and must so taint the proceedings as to render the discharge invalid. It is essential that the error cannot be cured by a simple and fair remedy.⁷

Remedies for Breach of Contractor Tenure Rights

A school district is liable for damages to a teacher if the board of education breaches a valid contract. A teacher who has been illegally dismissed has a right of action against the school district for

91, 260 N.W.2d 287 (1977), the Court reviewed the procedural error of failing to subpoena a witness requested by the teacher. The Court ordered a remand and supplementation of the record rather than to render the discharge invalid. Most procedural errors are correctable by tolling the appeal period. In *Davis v. River Rouge Bd. of Educ.*, 406 Mich. 486, 280 N.W.2d 453 (1979), the Court determined that reasonable remedy for failure to timely furnish a transcript as required by statute is to toll the period for appeal. In *Biberstine v. Port Austin Pub. Sch. Dist. No. 9*, 51 Mich. App. 274, 214 N.W.2d 729 (1974), the failure to give a teacher a written notice of the charges and statement of rights under the Tenure Act tolled the period for appeal. In *Goodwin v. Kalamazoo Bd. of Educ.*, 82 Mich. App. 559, 267 N.W.2d 142 (1978), failure to give a laid-off teacher a statement of her rights tolled the thirty-day appeal period.

⁵*Lawson v. Wayne Community Sch. Dist.*, 63 Mich. App. 57, 233 N.W.2d 713 (1975). When a board of education suspended a teacher without pay and decided he was disqualified from the procedural protection of the Tenure Act because of felony charges brought against him, the court awarded "all salary lost" from the date of suspension until the teacher resigned. *Wright v. Port Huron Sch. Dist.*, 13 Mich. App. 1, 163 N.W.2d 673 (1968).

⁶*Shiffer v. Gibraltar Schs.*, 393 Mich. 190, 224 N.W.2d 255 (1974).

⁷*Beyers v. Bd. of Educ. of St. Ignace*, TTC 77-17.

breach of contract.⁸ It is reasonable to assume that the improper suspension, demotion, or discharge of a teacher under the Tenure Act is equivalent to a breach of contract.

Once the courts have decided that a valid contract existed and was breached, or, for purposes of our discussion, the teacher's rights under the Teachers' Tenure Act were violated, it becomes necessary to determine the remedy. Reinstatement, of course, is ordered in nearly all cases. The money damages due to the teacher is the amount agreed upon for the teacher's services under the contract which is *prima facie* the measure of recovery.⁹ However, the board is entitled to deduct from that amount as mitigated damages whatever the teacher has earned in other employment of the same general kind. It is a well-established rule that in case of breach of contract the injured party must make every reasonable effort within his power to obtain similar employment to minimize his damages.¹⁰ The law does not require that the teacher

⁸Stoel v. Charlevoix v. Charlevoix Twp. Unit Sch. Dist., No. 1, 351 Mich. 152, 88 N.W.2d 278 (1958); Edgecomb v. Traverse City Sch. Dist., 341 Mich. 106, 67 N.W.2d 87 (1954); Farrell v. Sch. Dist. No. 2 of Rubicon, 98 Mich. 43, 56 N.W. 1053 (1893). Smith v. Sch. Dist. No. 2 of Pleasant Plains, 69 Mich. 589, 37 N.W. 567 (1888); Crane v. Sch. Dist. No. 6 of Bennington, 61 Mich. 299, 28 N.W. 105 (1886).

⁹Damages may include the amount due on the contract plus interest and costs of litigation. See Stoel v. Charlevoix Twp. Unit Sch. Dist. No. 1, 351 Mich. 152, 88 N.W.2d 278 (1958). An unlawfully dismissed teacher is probably entitled to participate in school security and retirement programs based on the damages awarded but cannot recover for the loss of fringe benefits. Mass v. Board of Educ., 61 Cal.2d 6192, 39 Cal. Rptr. 739, 394 P.2d 579 (1964). The courts are not likely to award any punitive damages to a teacher when a contract is breached illegally nor for emotional distress. However, a teacher was awarded \$1,000 compensatory damages for pain and suffering connected with aggravation of an ulcer condition. Lucia v. Duggan, 303 F.Supp. 112 (Mass. 1969).

¹⁰The standard for determining reasonable diligence has been stated as: "What constitutes reasonable diligence is a question of fact depending upon the circumstances of each particular case. The manner in which a person of ordinary diligence would presumably act under similar circumstances is the standard by which the court should determine whether this duty was properly performed. . . . He should try to diminish the loss resulting from the breach of contract by making such efforts to secure employment as an average person would make at that particular time and place." Rumph v. Wayne-Westland Community Sch., TTC 67-2-M at 5, citing Atholwood Development Co., U. Houston, 19 A2d 706, 708 (Maryland 1941).

seek or accept service of a different grade or character¹¹ or any other line of service¹² or vocation¹³ other than that in which he was employed by the board, or employment in a different region or locality.¹⁴

The case of Edgecomb v. Traverse City School District,¹⁵ a non-tenure case, illustrates the law in regards to a wrongful discharge during service. Edgecomb held a special one-year certificate authorizing the teaching of "institutional on-the-farm training in veterans classes." After teaching several months he was discharged. He did not obtain other employment in the teaching profession. The court ruled that he held a valid contract and awarded damages equal to an amount he would have received had he taught.

The school board contended that Edgecomb did not make reasonable effort to mitigate his damages. While the Court ruled that the teacher's duty to do so was unquestioned, the burden of proof rested on the board to show that the teacher might have secured other employment in the teaching profession if he had undertaken the obligation in good faith. The superintendent testified about a possible opening on a college farm, but did not present evidence that the teacher could have obtained the position or whether it would have been reasonably within his field of work. The Court found that the board had failed to show that the teacher might have lessened or obviated the damages that he actually sustained because of the breach of contract. The Court cited with approval the language in Byrne v. Independent School District of Struble.

When such contract is disregarded by the school district and the teacher is denied the right to perform, it is her duty to find other employment, and when sued, the school district may show that she has found other employment, or that by the use of reasonable diligence she might have found other employment for the purpose of

¹¹Farrell v. School Dist. No. 2 of Rubicon, 98 Mich 43, 56 N.W. 1053 (1893).

¹²Edgecomb v. Traverse City Sch. Dist., 341 Mich 106, 67 N.W.2d 87 (1954).

¹³Smith v. School Dist. No. 2 of Pleasant Plains, 69 Mich. 589, 37 N.W. 567 (1888).

¹⁴Byrne v. Independent Sch. Dist. of Struble, 139 Iowa 618, 117 N.W. 983 (1908).

¹⁵341 Mich. 106, 67 N.W.2d 87 (1954).

mitigating the damages; but, if the discharged teacher did not accept other employment, her damages should not be diminished for failure to secure it, unless it be shown that by reasonable diligence she might have secured employment of the same grade in the same locality where she was employed to teach. She was not required to accept employment in another locality or of a different or lower grade. The law is very clear on this proposition.¹⁶

When it is shown that subsequent employment was obtained or might have been obtained, the measure of damages becomes the difference between the contract price and the amount of money that was obtained or might have been obtainable in other employment. Deductions for employment not taken will not be allowed if the employment was not of similar character. If the teacher unjustifiably refuses to accept similar employment, a deduction for the amount which would have been earned is proper.¹⁷

The case of Farrell v. School District No. 2 of Rubicon sets forth the law regarding a breach of contract that occurs before the time services are to begin. The Court ruled that where a board of education wrongfully breached a teacher's contract during the summer and prior to the opening of school, the teacher was not required to seek other employment before the start of the school year. The Court observed that if teachers are taking their vacations for rest and recreation, they cannot legally be called to abandon these and seek employment for the coming year. The teacher was justified in notifying the defendant school district that she would insist on the performance of the contract.¹⁸

Salary Due and Mitigation of Damages. The teacher must be compensated for the excess salary over whatever he actually earned or could have earned elsewhere. Under the mitigation doctrine, wages that a teacher actually earns or could have earned during the wrongful suspension, demotion, or discharge are deducted from the teacher's salary in arriving at the net or actual amount of salary lost. The remedies for

¹⁶ 139 Iowa 618, 619, 117 N.W. 983, 984 (1908) cited in Edgecomb v. Traverse City Sch. Dist., 341 Mich 106, 116 67 N.W.2d 87, 91 (1954).

¹⁷ A teacher appealing a suspension or discharge may properly refuse employment of a permanent nature which would conflict with his effort to obtain reinstatement. See generally, Annot. 22 A.L.R.3d 1047 (1968).

¹⁸ 98 Mich. 43, 56 N.W. 1053 (1893).

wrongful suspension without pay, demotion, or discharge are reinstatement and all salary lost. The doctrine of mitigation is a well-established principle of Michigan teacher contract law as described above and is applicable to teachers and administrators in this state.

Application. The common law doctrine of mitigation of damages, as described above, has been adopted by our courts in fashioning a remedy for wrongfully suspended, demoted, or discharged tenured teachers.¹⁹ In Shiffer v. Gibraltar School District, Justice Levin wrote:

The doctrine of avoidable consequences/mitigation of damages takes into account the unique problem facing teachers in obtaining substitute employment. The common law does not "burden" them "with the task of scrounging around for other employment while challenging an unjust suspension." The common law recognizes that besides the difficulty of obtaining midyear employment, for many teachers their former employer is the only employer in town. The common law recognizes these problems and imposes no duty on teachers to accept employment outside of the teaching profession, or to accept a teaching position in another community, or at a lower status.²⁰

The Shiffer Court rejected the argument that the teacher was entitled to "all salary lost," without the necessity of mitigation,²¹ as a financial penalty on the school board.²² Awards of large sums, unrelated to actual loss to teachers, would not in the Court's opinion advance "the future of our children, the efficacy and dignity of the

¹⁹Shiffer v. Gibraltar Sch. Dist., 393 Mich. 190, 224 N.W.2d 255 (1974).

²⁰393 Mich. at 198, 224 N.W.2d at 258 (emphasis added).

²¹Justice Williams dissented on the issue of adoption of the common law mitigation doctrine and would hold that the language of the Tenure statute, "the teacher shall be entitled to all salary lost," means exactly that. *Id.* at 211, 224 N.W.2d at 264. He perceived the doctrine of mitigation as seriously eroding the legislature's intent to provide a "stout and just enforcement weapon." *Id.* at 212, 224 N.W.2d at 265.

²²The Shiffer Court seemed to recognize the problem of large potential liability faced by school boards: "The backlog of cases pending before the Tenure Commission and the unfortunately slow appeal process means that it will often be years before teachers who ultimately prevail are reinstated. Shiffer, for example was reinstated four years after his suspension. The teacher is Rumph v. Wayne Community School Dist., 31 Mich. App. 555; 188 N.W.2d 71 (1971). . . was suspended eight years ago. . . The amounts involved are not inconsiderable. In Shiffer's case, the amount potentially involved is four years' salary; in Rumph's, eight years," *Id.* at 199, 224 N.W.2d at 259.

teaching profession and the welfare of state."²³ The mitigation issue was remanded to the Tenure Commission for determination of the amount of back pay award with the following instructions:

[T]o deduct from the "salary" Shiffer would have earned all wages he actually earned that he would not have earned if he were employed as a teacher, and. . . to consider any evidence the school district offers that Shiffer, through exertion of proper efforts, could have earned more.²⁴

The Shiffer Court also adopted the common law principle that the burden of the mitigation issue is on the school district not the teacher.²⁵ This follows the established precedent that the burden falls on the party whose wrongful acts caused the damages. This burden must be met by a preponderance of the evidence.

Tenure Commission's Application of Standards

The initial mitigation decision of the Commission was on order of remand²⁶ from the Michigan Supreme Court in the matter of *Rumph v. Wayne-Westland Community Schools*.²⁷ This is the first attempt of the Commission to fashion standards and guidelines applicable to the issue of mitigation of damages under the Teachers' Tenure Act.

The Commission reviewed the principles on which mitigation of damages is founded. It concluded (1) that mitigation furthers public economic policy by avoiding waste (2) that a wronged person has an affirmative duty to avoid the damages caused by the improper action of another, (3) that one injured by the actions of another is to be placed into no better a position than he would have been had there been no injury, and (4) that mitigation is the tool to achieve that goal. The Commission held that the burden is on the controlling board to establish whether or not the teacher has made reasonable efforts to avoid the consequences of the board's wrongful act, and this burden

²³Id. at 200, 224 N.W.2d at 259.

²⁴Id. at 208, 224 N.W.2d 263.

²⁵Id. See *Edgecomb v. Traverse City Sch. Dist.*, 341 Mich. 106, 67 N.W.2d 87 (1954).

²⁶393 Mich. 809 (1975). The Supreme Court remanded this matter to the Tenure Commission for a determination of the amount of back pay award in light of its decision in *Shiffer v. Bd. of Educ. of Gibraltar Sch. Dist.*, 393 Mich. 190, 224 N.W.2d 255 (1974).

²⁷TTC 67-2-M.

must be met by a preponderance of the evidence. The board must establish that reasonable steps were not taken by the teacher to mitigate foreseeable damages and that had other employment been accepted, the employee could have avoided his damages in whole or in part without undue risk or suffering humiliation.

As to the question of "reasonable diligence" the Commission held the following criteria to be critical:

1. Market place. Its size is determined by the number of districts in which the teacher is expected to seek employment, availability of jobs within those districts, and the ease of obtaining those available jobs.
2. Degree, teaching certificate, seniority, and experience.
3. Effort teacher expended to establish reasonable diligence as evidenced by formal, written application or informal inquiries and frequency of contacts.
4. The negative impact that possible reinstatement might have on a new employer's decision to hire.

The Commission held that mitigation imposes a duty on the teacher to make a good faith effort to seek alternative employment. The availability of jobs is not the critical factor, but rather the effort the teacher expends in seeking a job. A controlling board does not meet its burden by the mere showing that jobs were available. The Commission stated that "[t]he mere fact jobs were available does not in and of itself, establish the failure to mitigate."²⁸

The Commission established that the total salary Rumph lost was \$112,000, but the "net loss" was reduced by \$19,000 for the period when he was employed as a supervisor of student teaching at Eastern Michigan University.

During one summer, Rumph was employed as a "tour guide." The Commission declined to allow the money he earned during that summer to be deducted on the general rule that a teacher would have engaged in such alternative summer employment even if his status had not changed.

The Commission then turned to the matter of the teacher's duty to seek employment within the same locality as he was working when discharged. It was noted that since Rumph had commuted a distance of fifteen miles prior to discharge, the Commission held that he had a duty to seek employment in those school districts within a radius of fifteen

²⁸Id. at 13. It must be assumed that the Commission believed school boards within the hiring area would reject Rumph in favor of a newly graduated teacher because of salary differences.

miles of his home.²⁹ Based on evidence submitted and the principle that the school board bears the burden, the Commission concluded that Rumph had sought alternative employment with reasonable diligence.³⁰

The Commission found that jobs were available within the fifteen mile commuting distance and that his discharge would not have eliminated Rumph from consideration. However, the Commission noted that Rumph's degrees and experience would probably have placed him greatly above a newly graduated teacher on the salary schedule.

Rumph's status of being "in limbo" was deemed an important factor because its functioned as a deterrent to future employment. The Commission stated that since Rumph:

was seeking relief through the courts throughout this period, any employment accepted would be subject to his right to reinstatement. This is especially true from the period August 4, 1979, when the Supreme Court denied leave to appeal on the merits to the time of actual reinstatement. . . . We find, therefore, that his affirmative duty to actively seek alternative employment was greatly tempered by this unique factual situation.³¹

²⁹Setting a standard in this manner is subject to challenge. Many teachers commute more than fifteen miles. What standard would the Commission apply if the teacher lived in the school district where he was wrongfully discharged? Or if he commuted 40 miles each day? Should the Commission have established a reasonable maximum commuting distance that could apply to most teachers? An exception would be a teacher who could not drive an automobile.

³⁰Rumph submitted verbal or written applications to nine districts within the fifteen mile radius but received no job offers. Of the four districts where Rumph submitted written application, all had teacher vacancies and would have considered Rumph a viable candidate, even with the blot of discharge on his record. However, Rumph received no offers of employment. Two Commissioners dissented on this holding. They concluded that the facts showed that Rumph had not sought alternative employment with due diligence. TTC 67-2-M.

³¹TTC 67-2-M at 12. The Commission clarified its ruling to apply to situations where reinstatement has not been settled. "In the more usual situation, where the right to reinstatement has not been finally determined on behalf of the teacher, we believe that a discharged teacher acting with reasonable diligence should file written applications with at least a majority of those school districts within the locality seeking a permanent teaching position each year said teacher is unemployed. Less than that, we find, is unreasonable in-action on the part of the teacher." (emphasis added).

Rumph testified that he sought both full time and substitute teaching. The Commission ruled that substitute teaching, as a matter of law, is not of like nature to the permanent, tenured position and adopted the guideline that:

the circumstances of substitute teaching are substantially different from those of a permanent, full-time position. The salary differential we have found to be substantial. Further, the working conditions, the stress of facing a new, unknown classroom each day, and the transitory nature of the placement make substitute employment, for the purposes of mitigation, employment not of like nature.³²

The Commission held that Rumph was entitled to all salary lost except that earned at Eastern Michigan University.

Method of Computing Interest

The Commission then considered the question of whether Rumph was entitled to receive interest in determining all salary lost. On this matter, the Attorney General was requested to give an opinion on the following question: "May the State Tenure Commission include an award of interest in an order for back pay to a teacher who has been reinstated by the Commission or a reviewing Court?"³³ The opinion held in pertinent part: "Interest on the funds actually lost by tenured teachers is part of the actual economic loss to them and the allowance of interest will compensate wrongfully discharged tenured teachers for the loss of the use of their funds."³⁴

The Attorney General held that the legal rate of interest for this purpose is 5 percent per year and the award of interest runs from the time each paycheck would have been paid to the wrongfully discharged teacher. Noting that it was bound to follow and apply the interpretation of the Attorney General, the Commission ordered that interest be computed and paid in accordance with the opinion.³⁵

³² Id. at 11.

³³ Id. at 14.

³⁴ Id. The Attorney General issued a "letter opinion" dated February 21, 1979.

³⁵ Id.

Compensation for Reduced Earnings

We have reviewed the general rule that a teacher who has been wrongfully discharged is entitled, as damages, to the amount owing under the contract of employment less the amount that he could have earned if he had made a reasonable effort to obtain similar employment. The question arises, however, whether damages may be assessed for reduced earnings beyond the expiration date of the contract when reinstatement is not authorized or ordered. It has been held that such damages will be awarded only when the employer had reason to foresee that such damage would result at the time the contract was made and if the amount of money damages can be proved to be a reasonable degree of certainty. Such damages are not to be awarded in every case where an employee is wrongfully terminated. This issue was raised in Anderson v. Westwood Schools.³⁶ The court first cited the problems faced by discharged teachers as stated by Justice T. G. Kavanagh: "Discharge (or failure to rehire) is a blemish that can permanently scar his record and effectively limit any chance he has to be rehired as a teacher in this state."³⁷

The circuit court found ample evidence that the above result had been demonstrated by the plaintiff's search for new employment. An award of \$10,950 for reduced earnings, as part of the damage award, was sustained.

If reinstatement is ordered, there would be no need to provide an award for reduced earnings. In Anderson, the plaintiff was a superintendent and his request for reinstatement was denied because he was a nontenured teacher.³⁸ The damages awarded were in a nontenure civil action but he was not reinstated.³⁹ While reinstatement is usually ordered in wrongful suspension without pay, demotion or discharge cases, it is not always ordered. The principle of law set out in Anderson may be applicable in some situations.

Attorney Fees

The question of whether a teacher who has been improperly dismissed is entitled to attorney's fees has not been determined in this state.

³⁶ 49 Mich. App. 406, 212 N.W.2d 232 (1973).

³⁷ 49 Mich. App. 406, 410, 212 N.W.2d 232, 234 (1973), citing Munro v. Elk Rapids Schs., 383 Mich. 661, 692, 178 N.W.2d 450, 464, dissenting opinion (1970). Dissenting opinion adopted as opinion of the Court on rehearing, 385 Mich. 616, 189 N.W.2d 224 (1971).

³⁸ Anderson v. Westwood Community Schs., TTC 70-13.

³⁹ Anderson v. Westwood Sch., 49 Mich. App. 406, 212 N.W.2d 232 (1972).

In King v. Caesar Rodney School District,⁴⁰ the Federal District Court in Delaware held that only if the teacher could show that the board acted "in bad faith, vexatiously, wantonly, or for oppressive reasons" would he be entitled to attorney fees. A termination which is procedurally defective was held not to be the product of bad faith. The same rule would probably apply to Michigan.

⁴⁰396 F. Supp. 423 (Del. 1975).

APPENDIX

The Teachers' Tenure Act

Rules of Practice and Procedure
of the State Tenure Commission

State Board of Education
Definition of "Certificated"

Court Decisions

Opinions of Michigan Attorney
General

TEACHERS' TENURE
[Act 4, P.A. (Ex. Sess.), 1937]]

AN ACT relative to continuing tenure of office of certificated teachers in public educational institutions; to provide for probationary periods; to regulate discharges or demotions; to provide for resignations and leaves of absence; to create a state tenure commission and to prescribe the powers and duties thereof; and to prescribe penalties for violation of the provisions of this act. Am. 1964, p. 8, Act 2, Eff. Aug. 28.

The People of the State of Michigan enact:

ARTICLE I.

DEFINITIONS.

38.71 DEFINITIONS; TEACHER.

Sec. 1. The term "teacher" as used in this act shall include all certificated persons employed for a full school year by any board of education or controlling board of any public educational institution.

HISTORY: Am. 1967, p. 313, Act 216; Imd. Eff. Jul. 10.

38.72 SAME; CERTIFICATED.

Sec. 2. The term "certificated" shall be as defined by the state board of education.

HISTORY: Am. 1967, p. 313, Act 216, Imd. Eff. Jul. 10.

38.73 SAME; CONTROLLING BOARD.

Sec. 3. The term "controlling board" shall include all boards having the care, management, or control over public school districts and public educational institutions.

38.74 SAME; DEMOTE.

Sec. 4. The word "demote" shall mean to reduce compensation or to transfer to a position carrying a lower salary.

38.75 SAME; SCHOOL YEAR.

Sec. 5. The "school year" shall be defined as the legal school year at the time and place where service was rendered.

ARTICLE II.

PROBATIONARY PERIOD.

38.81 PROBATIONARY PERIOD; TEACHERS THAT HAVE SERVED ONE SYSTEM THE REQUIRED PERIOD ON EFFECTIVE DATE OF ACT; AUTHORITY OF CONTROLLING BOARD.

Sec. 1. All teachers during the first 2 school years of employment shall be deemed to be in a period of probation: Provided, That any teacher under contract at the time this act becomes effective who has previously rendered 2 or more years of service in the same school district shall be granted continuing tenure immediately upon reappointment by the controlling board: Any such controlling board by unanimous vote of its members, however, may refuse to appoint a teacher who has rendered 2 or more years service in the school district under its control. In the event the vote against reappointment of such teacher is not unanimous the controlling board shall deem such teacher as on continuing tenure with full right to hearing and appeal as provided in article 4 and article 6 of this act: Provided further, That the controlling board, after this act becomes effective, may place on continuing tenure any teacher who has previously rendered 2 or more years of service.

38.82 SAME; NUMBER OF YEARS A TEACHER MAY BE REQUESTED TO SERVE; EXTENSION OF PERIOD.

Sec. 2. No teacher shall be required to serve more than 1 probationary period in any 1 school district or institution: Provided, That a third year of probation may be granted by the controlling board upon notice to the tenure commission.

38.83 SAME; NOTICE AS TO SATISFACTORINESS OF SERVICES; FAILURE TO SUBMIT STATEMENT, EFFECT; NOTICE OF DISCONTINUANCE OF SERVICE.

Sec. 3. At least 60 days before the close of each school year the controlling board shall provide the probationary teacher with a definite written statement as to whether or not his work has been satisfactory. Failure to submit a written statement shall be considered as conclusive evidence that the teacher's work is satisfactory. Any probationary teacher or teacher not on continuing contract shall be employed for the ensuing year unless notified in writing at least 60 days before the close of the school year that his services will be discontinued.

HISTORY: Am. 1967, p. 313, Act 216, Imd. Eff. Jul. 10.

38.84 SAME; PORTIONS OF ACT INAPPLICABLE.

Sec. 4. Articles 4, 5 and 6 shall not apply to any teacher deemed to be in a period of probation.

HISTORY: Add. 1963, p. 422, Act 242, Eff. Sep. 6.

CONTINUING TENURE.

38.91 CONTINUING TENURE; IN ADMINISTRATIVE CAPACITY, CONTRACT, EFFECT OF FAILURE TO REEMPLOY IN SUCH CAPACITY; EXTRA DUTY FOR EXTRA PAY.

Sec. 1. After the satisfactory completion of the probationary period, a teacher shall be employed continuously by the controlling board under which the probationary period has been completed, and shall not be dismissed or demoted except as specified in this act. If the controlling board shall provide in a contract of employment of any teacher employed other than as a classroom teacher, including but not limited to, a superintendent, assistant superintendent, principal, department head or director of curriculum, made with such teacher after the completion of the probationary period, that such teacher shall not be deemed to be granted continuing tenure in such capacity by virtue of such contract of employment, then such teacher shall not be granted tenure in such capacity, but shall be deemed to have been granted continuing tenure as an active classroom teacher in such school district. Upon the termination of any such contract of employment, if such controlling board shall not reemploy such teacher under contract in any such capacity, such teacher shall be continuously employed by such controlling board as an active classroom teacher. Failure of any controlling board to reemploy any such teacher in any such capacity upon the termination of any such contract of employment shall not be deemed to be a demotion within the provisions of this act. The salary in the position to which such teacher is assigned shall be the same as if he had been continuously employed in the newly assigned position. Failure of any such controlling board to so provide in any such contract of employment of any teacher in a capacity other than a classroom teacher shall be deemed to constitute the employment of such teacher on continuing contract in such capacity and subject to the provisions of this act. Continuing tenure shall not apply to an annual assignment of extra duty for extra pay.

HISTORY: Am. 1941, p. 148, Act 119, Imd. Eff. May 23; Am. 1963, p. 422, Act 242, Eff. Sep. 6.

38.92 SAME; EMPLOYMENT BY ANOTHER CONTROLLING BOARD; MAXIMUM PROBATIONARY PERIOD; OPTION OF BOARD; TIME FOR GIVING OF NOTICE.

Sec. 2. If a teacher on continuing tenure is employed by another controlling board, he shall not be subject to another probationary period of more than 1 year beginning with the date of employment, and may at the option of the controlling board be placed immediately on continuing tenure. Any notice provided under section 3 of article 2 shall be given at least 60 days before the completion of the year of probation. If a teacher

on continuing tenure becomes an employee of another controlling board as a result of school district annexation, consolidation or other form of school district reorganization, he shall be placed on continuing tenure within 30 days unless the controlling board, by a 2/3 vote on an individual basis, places the teacher on not more than 1 year probation.

HISTORY: Am. 1967, p. 313, Act 216, Imd. Eff. Jul. 10.

ARTICLE IV.

DISCHARGE, DEMOTION OR RETIREMENT.

38.101 DISCHARGE OR DEMOTION OF TEACHER ON CONTINUING TENURE; RETIREMENT.

Sec. 1. Discharge or demotion of a teacher on continuing tenure may be made only for reasonable and just cause, and only after such charges, notice, hearing, and determination thereof, as are hereinafter provided. Nothing in this act shall be construed as preventing any controlling board from establishing a reasonable policy for retirement to apply equally to all teachers who are eligible for retirement under Act No. 136 of the Public Acts of 1945 or having established a reasonable retirement age policy, from temporarily continuing on criteria equally applied to all teachers the contract on a year-to-year basis of any teacher whom the controlling board might wish to retain beyond the established retirement age for the benefit of the school system.

HISTORY: Am. 1941, p. 148, Act 119, Imd. Eff. May 23; Amd. 1966, p. 30, Act 15, Imd. Eff. Apr. 6.

38.102 SAME; WRITTEN CHARGES; SIGNATURES; PROFESSIONAL SERVICES; FURNISHING OF STATEMENT; HEARING.

Sec. 2. All charges against a teacher shall be made in writing, signed by the person making the same, and filed with the secretary, clerk or other designated officer of the controlling board. Charges concerning the character of professional services shall be filed at least 60 days before the close of the school year. The controlling board, if it decides to proceed upon such charges, shall furnish the teacher with a written statement of the charges including a statement of the teacher's rights under this article, and shall, at the option of the teacher, provide for a hearing to take place not less than 30 nor more than 45 days after the filing of such charges.

HISTORY: Am. 1967, p. 313, Act 216, Imd. Eff. Jul. 10.

38.103 SAME; SUSPENSION, COMPENSATION.

Sec. 3. On the filing of charges in accordance with this section, the controlling board may suspend the accused teacher from active performance of duty until a decision is rendered by

the controlling board, but the teacher's salary shall continue during such suspension: Provided, That if the decision of the controlling board is appealed and the tenure commission reverses the decision of the controlling board, the teacher shall be entitled to all salary lost as a result of such suspension.

38.104 SAME; HEARING, DECISION, POWERS OF BOARD.

Sec. 4. The hearing shall be conducted in accordance with the following provisions:

- a. The hearing shall be public or private at the option of the teacher affected.
- b. No action shall be taken resulting in the demotion or dismissal of a teacher except by a majority vote of the members of the controlling board.
- c. Both the teacher and the person filing charges may be represented by counsel.
- d. Testimony at hearings shall be on oath or affirmation.
- e. The controlling board shall employ a stenographer who shall make a full record of the proceedings of such hearing and who shall, within 10 days after the conclusion thereof, furnish the controlling board and the teacher affected thereby with a copy of the transcript of such record, which shall be certified to be complete and correct.
- f. Any hearing held for the dismissal or demotion of a teacher, as provided in this act, must be concluded by a decision in writing, within 15 days after the termination of the hearing. A copy of such decision shall be furnished the teacher affected within 5 days after the decision is rendered.
- g. The controlling board shall have the power to subpoena witnesses and documentary evidence, and shall do so on its own motion or at the request of the teacher against whom charges have been made. If any person shall refuse to appear and testify in answer to any subpoena issued by the controlling board, such controlling board may petition the circuit court of the county setting forth the facts which court shall thereupon issue its subpoena commanding such person to appear before the controlling board there to testify as to the matters being inquired into. Any failure to obey such order of the court may be punished by such court as contempt thereof.

38.105 NECESSARY REDUCTION IN PERSONNEL, REAPPOINTMENT, FIRST VACANCY.

Sec. 5. Any teacher on permanent tenure whose services are terminated because of a necessary reduction in personnel shall be appointed to the first vacancy in the school district for which he is certified and qualified.

ARTICLE V.

RESIGNATION AND LEAVE OF ABSENCE.

38.111 RESIGNATION AND LEAVE OF ABSENCE; TEACHER'S DUTIES, NOTICE.

Sec. 1. No teacher on continuing tenure shall discontinue his services with any controlling board except by mutual consent, without giving a written notice to said controlling board at least 60 days before September first of the ensuing school year. Any teacher discontinuing his services in any other manner than as provided in this section shall forfeit his rights to continuing tenure previously acquired under this act.

38.112 LEAVE OF ABSENCE; REQUEST; AUTHORITY OF BOARD TO GRANT WITHOUT REQUEST; HEARING RELATIVE TO PHYSICAL OR MENTAL DISABILITY.

Sec. 2. Any controlling board upon written request of a teacher may grant leave of absence for a period not to exceed 1 year, subject to renewal at the will of the board: Provided, That without request, leave of absence because of physical or mental disability may be granted by any controlling board for a period not to exceed 1 year: Provided further, That any teacher so placed on leave of absence shall have the right to a hearing on such unrequested leave of absence in accordance with the provisions for a hearing in article 4, section 4 of this act: Provided, That no leave of absence shall serve to terminate continuing tenure previously acquired under this act.

ARTICLE VI.

RIGHT TO APPEAL.

38.121 APPEAL; HEARING, NOTICE.

Sec. 1. A teacher who has achieved tenure status may appeal any decision of a controlling board under this act within 30 days from the date of such decision, to a state tenure commission. The state tenure commission shall provide for a hearing to be held within 60 days from the date of appeal. Notice and conduct of such hearing shall be the same as provided in article 4, section 4 of this act, and in such other rules and regulations as the tenure commission may adopt.

HISTORY: Am. 1963, p. 422, Act 242, Eff. Sep. 6.

ARTICLE VII.

STATE TENURE COMMISSION.

38.131 STATE TENURE COMMISSION; CREATION, MEMBERS, EX-OFFICIO SECRETARY; LEGAL ADVISOR.

Sec. 1. There is hereby created a state tenure commission of 5 members: 2 of whom shall be classroom instructors, 1 a member of a board of education of a graded or city school district, 1 a person not a member of a board of education or a teacher, and 1 a superintendent of schools. The superintendent of public instruction shall be ex officio secretary of the commission, and the attorney general shall assign to the commission an assistant who shall be legal advisor to the commission.

HISTORY: Am. 1963, p. 422, Act 242, Eff. Sep. 6.

38.132 SAME; TERMS, VACANCY.

Sec. 2. Within 30 days after the effective date of this act, the governor shall appoint the members of the tenure commission for the following terms: One for a term of 3 years, 1 for a term of 2 years and 1 for a term of 1 year. Each term shall begin on the first day of September. Immediately preceding the expiration of their respective terms the governor shall appoint succeeding members of the tenure commission for terms of 5 years. In the event of a vacancy on the tenure commission the governor shall immediately appoint a successor to complete the unexpired term.

38.133 SAME; GEOGRAPHICAL QUALIFICATIONS OF MEMBERS.

Sec. 3. Not more than 1 member of the tenure commission shall be appointed from any 1 school district.

38.134 SAME; QUALIFICATION OF TEACHER MEMBER.

Sec. 4. Any teacher appointed to the tenure commission after September 1, 1938, must be on continuing tenure.

38.135 SAME; TEACHER MEMBER'S STATUS WITH CONTROLLING BOARD.

Sec. 5. Membership on the state tenure commission shall not adversely affect the status of the teacher's tenure with a controlling board.

38.136 SAME; MEETINGS.

Sec. 6. (1) The tenure commission shall meet twice a year at stated times in the city of Lansing, and at other times and in other places as determined by the commission.

(2) The business which the commission may perform shall be conducted in compliance with Act No. 267 of the Public Acts of 1976, being sections 15.261 to 15.275 of the Michigan Compiled Laws. Public notice of the time, date, and place of the meeting shall be given in the manner required by Act No. 267 of the Public Acts of 1976.

HISTORY: Am. 1977, Act 252, Dec. 6, 1977.

38.137 SAME; POWER TO ENFORCE ACT.

Sec. 7. The tenure commission is hereby vested with such powers as are necessary to carry out and enforce the provisions of this act.

38.138 SAME; COMPENSATION AND EXPENSES.

Sec. 8. The members of the state tenure commission shall receive 40 days @ \$45.00 per day while hearing cases and shall be reimbursed for necessary traveling and other expenses incurred in the performance of the duties of the commission. The expenses of the state tenure commission shall be paid out of appropriations made by the legislature.

HISTORY: Am 1965, p. 10, Act 8, Imd. Eff. Apr. 8; Am. 1975, Act 56, Imd. Eff. May 20.

38.139 SAME; DUTY TO ACT AS BOARD OF REVIEW; RECORDS.

Sec. 9. (1) The tenure commission shall act as a board of review for all cases appealed from the decision of a controlling board. All records shall be kept in the office of the superintendent of public instruction.

(2) A writing prepared, owned, used in the possession of, or retained by the commission in the performance of an official function shall be made available to the public in compliance with Act No. 442 of the Public Acts of 1976, being sections 15.231 to 15.246 of the Michigan Compiled Laws.

HISTORY: Am 1963, p. 423, Act 242, Eff. Sep. 6; Am. 1977, Act 252, Imd. Eff. Dec. 12.

38.140 SAME; FIRST MEETING, ELECTION OF CHAIRMAN AND SECRETARY, RULES AND REGULATIONS.

Sec. 10. Within 30 days after the effective date of this act, the tenure commission shall hold a meeting in the city of Lansing for the purpose of organization and the election of a chairman and secretary, both of whom shall be members of the commission. The tenure commission shall draw up rules and regulations and shall have the power to amend same and to provide for the conduct of its affairs in such manner as shall be consistent with the provisions of this act.

- 38.141 (REPEALED. P.A. 1965, NO. 8, § 2, imd. eff. April 8.
THIS SECTION PROVIDED TWO-YEAR APPROPRIATION FOR EXPENSES OF THE TENURE COMMISSION.)

ARTICLE VIII.

DISTRICTS.

38.151 TEACHER TENURE ACT, APPLICATION.

Sec. 1. This act shall apply to all school districts of the state.

HISTORY: Am. 1964, p. 8, Act 2, Eff. Aug. 28.

- 38.152 (REPEALED BY PUB ACTS 1964, NO. 2, EFF AUGUST 28. SECTION PROVIDED THAT SCHOOL DISTRICT BOARD SHALL NOTIFY THE SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE RESULTS OF THE ELECTION.)

ARTICLE IX.

PENALTY.

38.161 VIOLATION OF ACT; PENALTY.

Sec. 1. Failure of any member of a controlling board to comply with any provisions of this act shall be deemed a violation of the law and shall subject said member to the same penalty as prescribed for a violation of the general school law.

ARTICLE X.

INCONSISTENT ACTS.

- 38.171 (REPEALED BY PUB ACTS 1947, NO. 129, EFF OCTOBER 11.
THIS WAS A REPEAL SECTION.)

38.172 TEACHERS; WAIVER OF RIGHTS IN CONTRACTS PROHIBITED.

Sec. 2. No teacher may waive any rights and privileges under this act in any contract or agreement made with a controlling board. In the event that any section or sections of a contract or agreement entered into between a teacher and a controlling board make continuance of employment of such teacher contingent upon certain conditions which may be interpreted as contrary to the reasonable and just causes for dismissals, provided by this act, such section or sections of a contract or agreement shall be invalid and of no effect in relation to determination of continuance of employment of such teacher.

ARTICLE XI.

SEVERING CLAUSE.

38.181 (REPEALED BY PUB ACTS 1945, NO. 267, IMD EFF MAY 25.
THIS WAS A SEVERING CLAUSE SECTION.)

ARTICLE XII.

EFFECTIVE DATE.

38.191 EFFECTIVE DATE.

Sec. 1. This act shall take effect and be in force from and
after September first, 1937.

STATE TENURE COMMISSION

GENERAL RULES

PART 1. GENERAL PROVISIONS

R 38.131. DEFINITIONS.

Rule 1. (1) "Act" means Act No. 4 of the Public Acts of the Extra Session of 1937, as amended, being § 38.71 et seq. of the Michigan Compiled Laws.

(2) "Commission" means the state tenure commission created by the act.

(3) The terms defined in the act have the same meaning when used in these rules.

R 38.132. MEETINGS OF COMMISSION.

Rule 2. The chairperson of the commission or a majority of its members may call a session of the commission. The hours of the commission when in session shall be from 9 a.m. to 12 noon and 1:30 p.m. to 5 p.m. except as otherwise ordered by the commission.

R 38.133. OFFICE OF COMMISSION.

Rule 3. The office of the commission shall be in the office of the state superintendent of public instruction.

R 38.139. RESCISSION.

Rule 9. The rules of practice and procedure of the commission, being R 38.71 and 38.101 to 38.123 of the Michigan Administrative Code and appearing on pages 342 to 345 of the 1957 Annual Supplement to the Code, pages 3542 and 3543 of the 1966 Annual Supplement to the Code and page 5354 of the 1970-71 Annual Supplement to the Code, are rescinded.

PART 2. APPEAL PROCEDURES

R 38.141. REPRESENTATION; APPEARANCES.

Rule 11. (1) Practice before the commission shall be limited to attorneys at law in good standing. However, any party may represent himself.

(2) An attorney representing litigants under the act, or a party representing himself, shall file a written appearance on or before the time of the filing of the petition or the answer, whichever shall be applicable, at the office of the commission. Substitution of a withdrawing attorney shall be made upon written stipulation of the withdrawing attorney and the party represented, or at the discretion of the commission. The stipulation shall be filed immediately with the commission.

R 38.142. FORM AND STYLE OF PAPERS.

Rule 12. Papers filed with the commission shall be printed or typewritten and, if typewritten, shall be on 1 side only of white bond paper not more than 8-1/2 inches wide and 13 inches long. Pleadings and briefs shall be filed with the commission along with 6 copies duly signed by the attorney, appealing party or controlling board member. The commission may waive filing of the extra copies. A single copy of exhibits and transcript shall be filed unless the commission requests additional copies. The proper caption and docket number shall be placed on all papers filed along with 1 signed copy. The given name and surname of the party shall be set forth in the caption.

R 38.143. INITIATION OF APPEAL.

Rule 13. An appeal from a decision of a controlling board under the act shall be initiated within 30 days from the date of receipt of such decision by the appealing party or the attorney of the appealing party by filing a notice of appeal and petition, original and 6 copies, with the commission substantially in the following forms:

Notice of appeal.

STATE OF MICHIGAN

STATE TENURE COMMISSION

Appellant.

vs.

Docket No.

Appellee.

NOTICE OF APPEAL

TO THE ABOVE NAMED APPELLEE(S):

(BOARD OF EDUCATION)

YOU ARE HEREBY NOTIFIED that a petition has been filed with the State Tenure Commission in the above matter, and that if you desire to defend the same, you are required to answer or take such other action as may be permitted by law with regard to the petition herewith served upon you within 20 days after service of this notice of appeal and petition, exclusive of the day of service. If you fail to do so, judgment by default may be taken against you for the relief demanded in the petition.

(A copy of the Michigan Teachers' Tenure Act and the rules of the State Tenure Commission governing the practice and procedure pertaining to proceedings before the State Tenure Commission may be obtained from the office of the Commission.)

DATED: _____

By order of the State
Tenure Commission

(Appealing party, or attorney)

(Business address)

Petition.

STATE OF MICHIGAN

STATE TENURE COMMISSION

Appellant.

vs.

Docket No.

Appellee.

PETITION

_____, the above named Appellant, (by his attorney), hereby petitions for a hearing and appeals the decision of Appellee, and as a basis alleges as follows:

I

FACTS

(Set forth by statement of the facts without repetition upon which cause of action the petitioner relies for specific averments as are necessary to inform reasonably the adverse party of the nature of the cause the adverse party is called upon to defend. Each allegation shall be clear, concise, and direct and set forth in a separate numbered paragraph.)

II

ASSIGNMENTS OF ERROR

(Set forth each assignment of error with such specific averments as are necessary to inform reasonably the adverse party of the nature of the claim asserted. Each assignment shall be clear, concise, and direct and stated in a separate numbered paragraph. Alleged error to be raised on appeal based upon a rule of the controlling board in the transcript of the local hearing must contain the citation of the volume and page of the transcript.)

III

RELIEF

(Set forth clearly and concisely those demands for relief to which petitioner deems himself or herself entitled. Relief in the alternative may be demanded.)

Appealing party, or attorney

R 38.144. FILING AND SERVICE OF NOTICE OF APPEAL AND PETITION.

Rule 14. An appeal is commenced by filing with the commission a notice of appeal, petition and transcript, if any. The petitioner shall serve the appellee forthwith in person or by registered mail with a copy of the notice of appeal petition.

R 38.145. FILING.

Rule 15. The filing of a document under these rules shall be with the office of the commission, and shall be received by the commission before the close of business on the last day of the time limit, if any, for the filing.

R 38.146. SERVICE.

Rule 16. Except for the original service of the notice of appeal and petition, service required or permitted to be made upon a party represented by an attorney shall be made as follows:

(a) Service upon the attorney shall be made by delivering or by mailing a copy to the attorney's last known business address. Service upon a party shall be made by delivering a copy or by mailing a copy to the party at the address as stated in the petition.

(b) Mailing of a copy within this rule means enclosing it in a sealed envelope with first class mail postage fully prepaid, addressed to the person to be served, and depositing the envelope and its contents in the United States government mail.

(c) Proof of service of papers required or permitted to be served may be written acknowledgment of service, by affidavit of the person making service, or by other proof satisfactory to the commission.

R 38.147. ANSWERS.

Rule 17. After service of a copy of a notice of appeal and petition, appellee shall have 20 days within which to file and serve an answer thereto. The answer shall contain specific admission or denial of each material allegation of fact contained in the petition and a statement of fact upon which the appellee relies for defense, and shall contain any affirmative allegations to be relied on by appellee. Each paragraph contained in the answer shall be numbered to correspond with the paragraphs in the petition. An original and 6 copies of the answer shall be filed with the commission and a copy shall be served upon all other parties.

R 38.148. AMENDMENTS.

Rule 18. The commission, or its chairperson, may permit a party to amend his pleadings before, during, or after the conclusion of the hearing upon such terms as may be deemed just and consistent with due process.

R 38.149. JOINDER OF PETITIONS.

Rule 19. More than 1 petitioner may join in an appeal with assertion of a right to relief jointly, severally or in the alternative in respect of or arising out of the same transaction, occurrence or series of transactions or occurrences, and if any question of law or fact common to all of them will arise in the action, or if it appears that their presence in the action will promote the convenient administration of justice. Misjoinder of petitioners is not ground for dismissal of the petition. Petitioners may be added or dropped by order of the commission on motion of any party or of its own initiative at any stage of the action and on such terms as are just.

PART 3. MOTION PRACTICE.

R 38.151. FORM, TIME FOR FILING.

Rule 21. (1) An application to the commission for an order in a pending action shall be by motion, in writing, unless made during a hearing. It shall state with particularity the grounds therefore, and shall set forth the relief of order sought.

(2) A written motion, a brief, and notice of the hearing thereof shall be served upon the opposing party before it is filed with the commission, unless a different time is fixed with good cause shown. Authorization by the chairperson of the commission for a different time shall be noted on the face of the notice. The day of hearing shall be not earlier than 14 days after the date the notice is served except by authorization

of the chairperson of the commission. When a motion is supported by affidavit, the affidavit shall be served with the motion. Opposing affidavits may be served not later than 7 days before the hearing unless the commission permits them to be served at some other time, as provided in rule 29.

(3) Motions and responses thereto shall be accompanied by a brief which shall contain a concise statement of reasons in support of, or in opposition of, and a citation of authorities upon which the parties rely.

(4) A respondent opposing a motion shall file his response, including brief, if any, and supporting affidavits, within 10 days after service of the motions or at such other time as permitted by the commission or its chairperson.

(5) The movant and respondent shall serve copies of their respective papers upon opposing parties before or concurrently with the filing with the commission, and the papers shall indicate the service.

R 38.152. MOTION FOR A MORE DEFINITE STATEMENT.

Rule 22. If a petition or answer is so vague or ambiguous that it fails to comply with these rules, the opposing party may move for a more definite statement before filing responsive pleadings. The motion shall point out the defects complained and the details desired.

R 38.153. MOTION TO STRIKE.

Rule 23. Upon motion made by a party or upon the commission's own initiative, the commission may order stricken from pleadings redundant, immaterial, impertinent, scandalous or indecent matter, or any part thereof not drawn in conformity with these rules, or evidence objected to which would not be admitted by the commission.

R 38.154. MOTION FOR ACCELERATED JUDGMENT.

Rule 24. Upon motion, a party may demand that an appeal be denied for 1 or more claims and a petition dismissed on the basis that the commission lacks jurisdiction of the subject matter, or that the appeal is barred because it is untimely or because of some other disability of the petitioner or other disposition of the claim, before commencement of the appeal. The commission may order an immediate hearing on disputed questions of fact and render a judgment forthwith if the proofs show the moving party is so entitled, or it may postpone the hearing until the merits are heard.

R 38.155. MOTION FOR SUMMARY JUDGMENT.

Rule 25. (1) A party seeking to recover upon a claim, or against whom a claim is asserted, may move, with or without supporting affidavits, for summary judgment in his favor on all or any part of the claim at any time. The motion shall state that the moving party is entitled to judgment in his favor because of any of the following:

(a) The petitioner has failed to state a claim upon which relief can be granted.

(b) The controlling board has failed to state a valid defense to the claim asserted against it.

(c) There is no genuine issue as to a material fact, except as to the relief to be granted, and the moving party is therefore entitled to judgment as a matter of law.

(2) A motion based upon subdivision (c) shall be supported by affidavits, and the opposing party may serve opposing affidavits. The affidavits, together with the pleadings, admissions, and documentary evidence then filed in the action or submitted by the parties, shall be considered by the commission at the hearing. Judgment shall be rendered forthwith if the pleadings show that a party is entitled to judgment as a matter of law or if the affidavits or other proof show that there is no genuine issue of fact. If it appears that the opposing party, rather than the moving party, is entitled to judgment, the commission may render summary judgment in his favor without the necessity of a motion therefor.

R 38.156. MOTION FOR ADJOURNMENT OR CONTINUANCE.

Rule 26. Adjournment or continuance shall not be granted except for good cause shown to the chairperson or designated member of the commission.

R 38.157. MOTION FOR DEFAULT JUDGMENT.

Rule 27. A petitioner may move for a judgment by default if the appellee has failed to file and serve an answer in accordance with these rules and that fact is made to appear by affidavit. If, to enable the commission to enter a judgment or to carry it into effect, it is necessary to take testimony concerning lost salary, to establish the truth of an allegation by evidence or to make investigation of any other matter, the commission may conduct hearings as it deems necessary and proper. For good cause shown, the commission may set aside a default judgment if application to have it set aside is made before the entry of the judgment or within 1 month after the judgment was served upon the party defaulted. A proceeding to set aside a default judgment, except when grounded on want of jurisdiction of the matter, shall be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed with the commission.

R 38.158. MOTION FOR REHEARING.

Rule 28. A motion for rehearing may be filed within 60 days after the date of a decision. It shall state briefly and distinctly the grounds therefore.

R 38.159. HEARING OF MOTIONS.

Rule 29. When the motion is filed, the moving party shall request a date for a motion to be heard prior to or at the time of the pre-hearing conference. At the discretion of the com-

mission and for just cause, a motion may be heard at any time. If no response, including a brief, to the motion is timely filed, the motion shall be considered and decided without a hearing unless otherwise ordered by the commission. The commission may dispense with or limit oral arguments on motions.

PART 4. PRE-HEARING CONFERENCE.

R 38.161. SCOPE OF CONFERENCE.

Rule 31. In every matter, the commission shall direct the parties and their attorneys to appear for a pre-hearing conference to:

(a) State and simplify the factual and legal issues involved and consider the amendment of pleadings.

(b) Consider motions to be disposed of before hearing, the consolidation of the case with another, admissions of fact and authenticity of documents to avoid unnecessary proofs, and limiting the number of witnesses and the nature and extent of the relief demanded.

(c) Produce all proposed documentary evidence and admit their authenticity whenever possible.

(d) Prepare a list of witnesses who may be called at the time of the hearing.

(e) Estimate the time for hearing.

(f) Discuss the possibility of settlement.

(g) Consider all other matters that may aid in the disposition of the subject of disagreement.

R 38.162. PRE-HEARING SUMMARY.

Rule 32. The petitioner, or his attorney, shall prepare and file and cause to be served upon the opposing party within 10 days after the pre-hearing conference a summary of the results of the conference specifically covering each of the items discussed. The opposing party, within 5 days of service of the summary, may file objections thereto with the commission.

R 38.163. HEARING BRIEFS.

Rule 33. The commission at the time of the pre-hearing conference may direct the parties to furnish the commission with a hearing brief as to any of the issues involved in the action. If required, hearing briefs are to be submitted to the commission at least 10 days before the hearing unless a different date is set by the commission, or unless the commission specifically waives the requirement.

R 38.164. PRESENCE OF PARTIES.

Rule 34. The commission may direct the parties to the action to be present or immediately available at the time of the pre-hearing conference.

R 38.165. WAIVER OF PRE-HEARING CONFERENCE.

Rule 35. The provisions of these rules pertaining to the

pre-hearing conference and pre-hearing summary may be waived by stipulation of counsel of all parties to the action subject to the approval of the commission.

PART 5. HEARINGS.

R 38.171. NOTICE OF HEARING.

Rule 41. The commission shall notify all parties, including members of the commission, of the time and place of a hearing, either in person or by ordinary mail, at least 14 days prior thereto.

R 38.172. GENERAL PROVISIONS.

Rule 42. A hearing for the purpose of taking evidence upon a petition shall be conducted by the commission or a hearing officer designated and authorized by the commission. A party may appear at a hearing in person or by legal counsel and may call, examine, and cross-examine witnesses and introduce into the record documentary or other evidence. Stipulations of fact may be introduced in evidence at the hearing at the discretion of the presiding officer conducting the hearing. An objection to the conduct of the hearing, including an objection to the introduction of evidence, may be oral or written and accompanied by a short statement of the grounds therefor. In a contested case, the rules of evidence as applied in a nonjury civil case in circuit court shall be followed as far as practicable but the commission or its designated and authorized hearing officer conducting the hearing may admit and give probative effect to evidence of a type commonly relied upon by reasonably prudent people in the conduct of their affairs. Irrelevant, immaterial, or unduly repetitious evidence may be excluded. Effect shall be given to the rules of privilege recognized by law. Objections to offers of evidence may be made and shall be noted in the record. The commission may take official notice of judicially cognizable facts, and may take notice of general, technical, or scientific facts within the commission's specialized knowledge.

R 38.173. SUBPOENAS.

Rule 43. (1) At the request of a party, subpoenas for attendance at a hearing shall be issued by the chairperson of the commission. A subpoena may command the person to whom it is directed to produce books, papers, documents, or other tangible things designated therein; but the commission, upon motion made at or before the time specified in the subpoena for compliance therewith, may quash or modify the subpoena if it is unreasonable or oppressive.

(2) Every subpoena shall be issued by the chairperson of the commission, shall state the title of the matter, and shall command each person to whom it is directed to attend and give testimony at a time and place therein specified.

The chairperson shall issue a subpoena signed, but otherwise in blank, to a party requesting it who shall fill it in before service.

(3) A subpoena shall be served by leaving it personally with the person to whom it is directed. The commission may allow service of a subpoena to be made upon a person in any other manner which is reasonably calculated to give him actual notice of the subpoena, if the chairperson of the commission has authorized the service before it is made, upon a showing to the chairperson that service of the subpoena cannot reasonably be made in person.

(4) Witnesses subpoenaed before the commission shall be paid the same fees and mileage that are paid to witnesses in circuit courts. Witness fees and mileage shall be paid by the party at whose instance the witnesses appear but may be recovered by the appealing body as costs if the commission so directs.

R 38.174. DEPOSITIONS.

Rule 44. The chairperson of the commission, upon the request of a party, may permit the taking of depositions or the serving of interrogatories for the purpose of discovery or testimony if the ends of justice would be served. A deposition shall be taken in accordance with the procedural requirements for the taking of depositions set forth in the Michigan general court rules.

R 38.175. BRIEFS.

Rule 45. A party is entitled, upon request made before the close of the hearing, to file a brief with the commission which may fix a reasonable time for the filing. The commission may direct the filing of briefs if in its opinion the filing is warranted by the nature of the proceedings or the particular issues involved. The commission shall designate the manner of filing and serving and the time therefor.

R 38.176. PROPOSED FINDINGS OF FACT AND DECISION.

Rule 46. A party is entitled, upon request made before the close of the hearing, to file proposed findings of fact, or a proposed decision, or both, with the commission which may fix a reasonable time for the filing. The commission may direct the filing of proposed findings of fact, or a proposed decision, or both, when in the opinion of the commission the filing is warranted by the nature of the proceedings or the particular issues involved. The commission may designate the manner of filing and serving and the time therefor.

R 38.177. DECISION OR ORDER.

Rule 47. (1) A decision or order of the commission shall be effective only if voted upon by a majority of the members of the commission, however, during the course of the hearing, the rulings of the chairperson of the commission are final.

(2) A decision or order of the commission shall be served in writing to the parties concerned, or to their attorneys if represented, by registered mail.

R 38.178. POWERS OF CHAIRPERSON OF THE COMMISSION.

Rule 48. The chairperson of the commission shall have the power to:

- (a) Hold pre-hearing conferences.
- (b) Dispose of procedural requests or similar matters.
- (c) Continue or adjourn a hearing.
- (d) Allow depositions to be taken.
- (e) Issue subpoenas in the name of the commission.
- (f) Conduct the hearing and take any other action which he is authorized to take under these rules.
- (g) Designate a member of the commission to act as his delegate and exercise any of his powers whenever he is unable to act and circumstances require immediate action to be taken.

TEACHERS' TENURE*

(By authority of art. 1, par. 2, Act No. 4, Public Acts of 1937 (Ex. Ses.) [CL 1948, § 38.71 et seq.])

R 390.661. CERTIFICATION OF TEACHERS UNDER TEACHERS' TENURE ACT.

a. For the purpose of teacher tenure under the provisions of article 2, Act No. 4, Public Acts of 1937, Extra Session, "certificated" as it refers to teachers shall include any teacher holding a Michigan certificate which is valid for the position to which he is assigned, but shall not include non-degree persons holding special certificates as teachers or teacher aides in training in experimental programs.

b. For the purposes of article 3, Act No. 4, Public Acts of 1937, Extra Session, "certificated" shall include any teacher who holds a junior (community college) permanent certificate, an elementary or secondary permanent certificate, or an elementary or secondary provisional certificate. It shall also include any teacher who holds both a bachelor's degree and a life certificate. In the event that a nondegree life certificated teacher is employed in a school district which has adopted tenure on or after July 1, 1958, or whose services have been acquired by a tenure district through school district reorganization or annexation, the teacher shall be considered certificated under the provisions of article 3, Act No. 4, Public Acts of 1937, Extra Session, if he annually completes 6 semester hours of additional credit applying on requirements for a bachelor's degree: Provided that the state board of education may make exceptions to this requirement in hardship cases. It shall also include any teacher who holds a degree but is serving on a special certificate because of other deficiencies toward a provisional certificate, providing that he annually completes 6 semester hours of additional credit applying toward such deficiencies. It shall also include any nondegree teacher serving on a special certificate because of deficiencies toward a provisional certificate providing that he completes annually 6 semester hours of additional credit applying toward such deficiencies, but shall not include nondegree persons holding special certificates as teachers or teacher aides in training in experimental programs.

HISTORY: 1954 ACS 6, p. 16; 1954 ACS 25, p. 36; 1954 ACS 27, p. 5; 1954 ACS 40, p. 25.

*Section 38.72 of the Michigan Teacher's Tenure Act gives the authority to the State Board of Education to define the term "certificated" as used in the Act.

COURT DECISIONS

Listed below are the decisions of the Michigan Supreme Court and the Michigan Court of Appeals wherein the Michigan Teacher's Tenure Act was interpreted.

Michigan Supreme Court Cases

Ajluni v. Bd. of Educ. of West Bloomfield Sch. Dist., 397 Mich. 462, 245 N.W.2d 49, (1976); [reversing 59 Mich. App. 213, 229 N.W.2d 385 (1975)].

Amato v. Oxford Area Community Sch. Dist. No. 7, 402 Mich. 521, 266 N.W.2d 445 (1978) [reversing 70 Mich. App. 305, 245 N.W.2d 728 (1976)].

Beebee v. Haslett Public Sch., (after remand to Tenure Commission) 406 Mich. 224, 278 N.W.2d 37 (1979) [reversing 66 Mich. App. 718; 239 N.W. 724 (1976)].

Benton Harbor Sch. Dist. v. State Tenure Commission, 372 Mich. 270, 126 N.W.2d 102 (1964).

Bode v. Roseville Sch. Dist. 405 Mich. 517, 275 N.W.2d 472 (1979).

Davis v. River Rouge Bd. of Educ., 406 Mich. 486, 280 N.W.2d 453 (1979). [Reversing in part, affirming in part Davis v. River Rouge Bd. of Educ., 73 Mich. App. 358, 251 N.W.2d 585 (1977)].

Detroit Fed. of Teachers v. Bd. of Educ., Detroit, 396 Mich. 220, 240 N.W.2d 255, (1972). [reversing 50 Mich. App. 660, 213 N.W.2d 839 (1973)].

Dodge v. Bd. of Educ. of School Dist. of Saginaw, 384 Mich. 346, 183 N.W.2d 793 (1971) [reversing 17 Mich. App. 664, 170 N.W.2d 290 (1969)].

Dryden v. Marcellus Community Sch., 401 Mich. 76, 257 N.W.2d 79 (1977) [reversing 73 Mich. App., 250 N.W.2d 782 (1976)].

Kar v. Sch. Dist. Hamtramck, 344 Mich. 297, 73 N.W.2d 848 (1951).

Lipka v. Brown City Community Sch., 399 Mich. 704, 252 N.W.2d 770 (1977) [rehearing granted, 400 Mich. 984].

Lipka v. Brown City Community Sch., (rehearing) 403 Mich. 554, 271 N.W.2d 771 (1978).

Long v. Board of Educ. Dist. No. 1 Fr. Royal Oak Twp., City of Oak Park, 350 Mich. 324, 86 N.W.2d 275 (1957).

McFarlane v. East Detroit Bd. of Educ., 364 Mich. 103, 110 N.W.2d 808 (1961).

Munro v. Elk Rapids Sch., 383 Mich. 661, 178 N.W.2d 450 (1969) [reversed on rehearing, 385 Mich. 618, 189 N.W.2d 224 (1971)].

Munro v. Elk Rapids Sch., 385 Mich. 618, 189 N.W.2d 224 (1971) [on rehearing, reversing 17 Mich. App. 368, 169 N.W.2d 527 (1969)].

Pounder v. Harper Woods Bd. of Educ., 402 Mich. 91, 260 N.W.2d 287 (1977) [affirming in part and reversing in part, 72 Mich. App. 717, 250 N.W.2d 504 (1976)].

Rehberg v. Bd. of Educ. of Melvindale, Ecorse Twp. School Dist. No. 11, 330 Mich. 541, 48 N.W.2d 142 (1951).

Rehberg v. Ecorse Sch. Dist. No. 11, 345 Mich. 731, 77 N.W.2d 131 (1956).

Rockwell v. Bd. of Educ. of Sch. Dist. of Crestwood, 393 Mich. 616, 227 N.W.2d 736 [appeal dismissed 96 S. Ct. 3184, 427 U.S. 901, 49 L.Ed. 2d 1195 (1975)].

Sch. Dist. of Royal Oak v. State Tenure Commission, 367 Mich. 689, 117 N.W.2d 181 (1962).

Rumph v. Wayne-Westland Community Schools, 393 Mich. 809 (1975).
(Remanded cause to Tenure Commission for determination of back pay award.)

Shaw v. Bd. of Trustees, Macomb County Community College, 389 Mich. 69, 204 N.W.2d 129 (1973).

Shiffer v. Bd. of Educ. of Gibraltar Sch. Dist., 393 Mich. 190, 224 N.W.2d 255 (1974) [reversing 45 Mich. App. 190, 206 N.W.2d 250 (1973)].

Snigel v. Southgate Community Sch. Dist., 388 Mich. 531, 202 N.W.2d 305 (1970) [reversing 24 Mich. App. 179, 180 N.W.2d 215 (1970)].

Street v. Ferndale Bd. of Educ., 361 Mich. 82, 104 N.W.2d 748 (1961).

Weckerly v. Mona Shores Bd. of Educ., 388 Mich. 731, 202 N.W.2d 777 (1972) [reversing 28 Mich. App. 243, 184 N.W.2d 323 (1970)].

Wilson v. Flint Bd. of Educ., 361 Mich. 691, 106 N.W.2d 136 (1960).

Michigan Court of Appeals Cases

Ajluni v. Bd. of Educ. of West Bloomfield Sch. Dist., 59 Mich. App. 213, 229 N.W.2d 385 (1975) [reversed on other grounds, 397 Mich. 462, 245 N.W.2d 49 (1975)].

Amato v. Oxford Area Community Sch. Dist. No. 7, 70 Mich. App. 305, 245 N.W.2d 728 (1976) [reversed in 402 Mich 521, 266 N.W.2d 455 (1978)].

Andersen vs. Bd. of Educ. for School Dist. of Adrian, 73 Mich. App. 33, 250 N.W.2d 786 (1976).

Anderson v. Harper Woods Sch. Dist., 74 Mich. App. 227, 253 N.W.2d 718 (1977).

Anderson v. Westwood Community Sch. Dist., 49 Mich. App. 406, 212 N.W.2d 232 (1973).

Beebee v. Haslett Public Schools, 40 Mich. App. 296, 198 N.W.2d 860 (1972).

Beebee v. Haslett Public Schools, 66 Mich. App. 718, 239 N.W.2d 724 (1976) [reversed, 406 Mich. 224, 278 N.W.2d 37 (1979)].

Bennett v. Sch. Dist. of Royal Oak, 10 Mich. App. 265, 159 N.W.2d 245 (1968).

Biberstine v. Port Austin Public School Dist. No. 9, 51 Mich. App. 274, 214 N.W.2d 729 (1974).

Blurton v. Bd. of Educ. of Sch. Dist. of Bloomfield Hills, 60 Mich. App. 741, 231 N.W.2d 535 (1975).

Bode v. Roseville Sch. Dist., Mich. App. No. 24484, May 4, 1976 (unpublished opinion).

Boyce v. Bd. of Educ. of Sch. Dist. of Royal Oak, 76 Mich. App. 526, 257 N.W.2d 153 (1977). [Leave to appeal granted on limited issue whether MCLA 38.83; MSA 15.1983 applies to probationary teachers whose services are terminated because of economic reasons. 402 Mich 894 (1978)].

Brechemin v. South Redford Sch., Mich. App. No. 23974, April 20, 1977 (unpublished opinion).

Bruinsma v. Wyoming Public Sch., 38 Mich. App. 745, 197 N.W.2d 95 (1972).

Burton v. Center Line Bd. of Educ., Mich. App. No. 26770, March 30, 1977 (unpublished opinion).

Caddell v. Ecorse Bd. of Educ., 17 Mich. App. 632, 170 N.W.2d 277, (1969).

Chester v. Harper Woods Sch. Dist., 87 Mich. App. 235, 273, N.W.2d 916 (1978).

Commeret vs. Bd. of Educ. of Jenison, 75 Mich. App. 115, 254 N.W.2d 808 (1977).

Comstock Public Schools v. Wildfong, ____ Mich. App. ____, ____ N.W.2d ____ 1979.

Davis v. Bd. of Educ. River Rouge, 73 Mich. App. 358, 251 N.W.2d 585 (1977). [Reversed in part, affirmed in part, Davis v. River Rouge Bd. of Educ. 406 Mich. 486, 280 N.W.2d 453 (1979)].

Detroit Federation of Teachers, Local 231, AFT, AFL-CIO v. Bd. of Educ. of Sch. Dist. of City of Detroit, 50 Mich. App. 660, 213 N.W.2d 839 (1973) [reversed on other grounds, 396 Mich. 220, 240 N.W.2d 225 (1972)].

Dodge v. Bd. of Educ. of Saginaw, 17 Mich. App. 664, 170 N.W.2d 290 (1969) [reversed by 384 Mich. 346, 183 N.W.2d 793 (1971)].

Dryden v. Marcellus Schools, 73 Mich. App. 40, 250 N.W.2d 782 (1976) [Reversed 401 Mich. 76, 257 N.W.2d 79 (1979)].

East Detroit Sch. Dist. v. Karabetsos, 17 Mich. App. 10, 168 N.W.2d 654 (1969).

East Detroit Federation of Teachers, AFT Local 698 v. Bd. of Educ. of Sch. Dist. of East Detroit, 55 Mich. App. 451, 223 N.W.2d 9 (1974).

Elgammal v. Macomb County Intermediate Sch. Dist., 83 Mich. App. 444, 268 N.W.2d 679 (1978).

Ellis v. Wakefield Twp. Sch. Dist., 79 Mich. App. 347, 261 N.W.2d 320 (1977).

Ferndale Educ. Ass'n. v. Sch. Dist. of Ferndale, 67 Mich. App. 637, 242 N.W.2d 478 (1976).

Freiberg v. Bd. of Educ. of Big Bay De Noc Sch. Dist., 61 Mich. App. 404, 232 N.W.2d 718 (1975).

Freiberg v. Bd. of Educ. of Big Bay De Noc Sch. Dist., No. 78-1691 Mich. App. (July 23, 1979) ____ Mich. App. ____, ____ N.W.2d ____ (1979).

Fucinari v. Dearborn Bd. of Educ., 32 Mich. App. 108, 188 N.W.2d 229 (1971).

Goodwin v. Bd. of Educ. of Kalamazoo, 82 Mich. App. 559, 267 N.W.2d 142 (1978).

Henderson v. Memphis Community Sch. Dist., 57 Mich. App. 770, 226 N.W.2d 725 (1975).

- Holton Public Sch. v. Farmer, 77 Mich. App. 765, 259 N.W.2d 219, (1977).
- Karabetsos v. Sch. Dist. East Detroit, 17 Mich. App. 10, 168 N.W.2d 654 (1969).
- Kewin v. Bd. of Educ. of Melvindale-Northern Allen Park Public Sch., 65 Mich. App. 472, 237 N.W.2d 514 (1975).
- Lawson v. Wayne Community Sch. Dist., 63 Mich. App. 57, 233 N.W.2d 713 (1975).
- Lipka v. Brown City Community Sch., 59 Mich. App. 175, 229 N.W.2d 362 [affirmed in part, reversed in part, 399 Mich. 704, 252 N.W.2d 770 (1977)].
- Luiher v. Bd. of Educ. of Alpena, 62 Mich. App. 32, 233 N.W.2d 173 (1975).
- Mullally v. Bd. of Educ. Trenton, 13 Mich. App. 464, 164 N.W.2d 742 (1968).
- Munro v. Elk Rapids Sch., 17 Mich. App. 368, 169 N.W.2d 527 (1969) [affirmed, 383 Mich. 661, 178 N.W.2d 450, rehearing and reversed 385 Mich. 618, 189 N.W.2d 224 (1969)].
- Pounder v. Harper Woods Bd. of Educ., 72 Mich. App. 717, 250 N.W.2d 504 (1977) [affirmed in part, reversed in part, 402 Mich. 91, 260 N.W.2d 287 (1977)].
- Rockwell v. Bd. of Educ. of Sch. Dist. of Crestwood, 57 Mich. App. 636, 226 N.W.2d 596 [reversed on other grounds, 393 Mich. 616, 227 N.W.2d 736; appeal dismissed 96 S. Ct. 3184, 427 U.S. 901, 49 L.Ed. 2d 1195 (1975)].
- Rogers v. Bd. of Educ. Trenton, 61 Mich. App. 682, 233 N.W.2d 141 (1975) [leave to appeal denied].
- Royal Oak Sch. Dist. v. Schulman, 68 Mich. App. 589, 243 N.W.2d 673 (1976).
- Rumph v. Wayne Community Sch. Dist., 31 Mich. App. 555, 188 N.W.2d 71 (1971) [remanded to Tenure Commission for determination of amount of backpay, 393 Mich. 809 (1975)].
- Shaw v. Bd. of Trustees, Macomb County Community College, 37 Mich. App. 96, 194 N.W.2d 558 [affirmed 389 Mich. 69, 204 N.W.2d 129 (1971)].
- Shiffer v. Bd. of Educ. of Gibraltar Sch. Dist., 45 Mich. App. 190, 206 N.W.2d 250 [reversed on other grounds, 393 Mich. 190, 224 N.W.2d 255 (1973)].

- Shippey v. Madison Pub. Sch., 55 Mich. App. 663, 223 N.W.2d 116 (1974).
- Simmons v. Bd. of Educ. of Marlette Community Sch., 73 Mich. App. 1, 250 N.W.2d 777 (1976).
- Simon v. Gibraltar Sch. Dist., 52 Mich. App. 643, 217 N.W.2d 891 (1974).
- Smigel v. Southgate Community Sch. Dist., 24 Mich. App. 179, 180 N.W.2d 215, [reversed on other grounds, 388 Mich. 531, 202 N.W.2d 305 (1970)].
- Steeby v. Sch. Dist. of Highland Park, 56 Mich. App. 395, 224 N.W.2d 97 (1974).
- Sutherby v. Bd. of Educ. of Gobles, 73 Mich. App. 506, 252 N.W.2d 503 (1977).
- Thomas v. School District of Kalamazoo, 74 Mich. App. 560, 254 N.W.2d 576 (1977).
- Ward v. Detroit Bd. of Educ., Mich. App. No. 26405, December 1977 (unpublished opinion).
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